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LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN *

A MOST attractive picture of the English Bench was given by Sir John Fortescue, the Chief Justice of the King's Bench from 1442 to 1460. He said of his colleagues of that day—

> "They sit from eight to eleven. They then study the law, read Holy Scripture, or use other contemplation at their pleasure."

Those days are gone. Leisure for contemplation has gone too. As Lord Asquith of Bishopstone said of the work of the Court of Appeal, it is "plain black robes and grinding work." Professor Friedmann's book illustrates the value of time for contemplation when pursuing the profession of the law. It was the enforced exile of Fortescue himself that gave him the opportunity to reflect at leisure on the administration of the law, and thus to add something distinctive to legal literature. The same detached contemplation was exhibited in Professor Friedmann's earlier book, *Legal Theory*, in his analysis of the effect of social changes upon the law, and now, with immense knowledge gained from the legal systems of many countries, and with reforming zeal that stands out from the printed page, he analyses "the function of law and legal institutions in the vastly changed social pattern of contemporary England." Professor Friedmann says of his present work that it is a "preliminary and incomplete attempt to analyse problems which range over the whole field of jurisprudence," and Denning L.J. (who contributes an appreciative Foreword) says that the author "shows that the law is simply a means—albeit an elaborate and uncertain means—by which society works out its purposes." The outstanding virtue of the present book is that it does for the busy practitioners of the law what they are scarcely able to do for themselves—to stand aside and scrutinise the development of the law in relation to the social background. If the law is to accord with man's most imperious and deepest instincts

* *Law and Social Change in Contemporary Britain.* By W. Friedmann. (Stevens & Sons Ltd. 37s. 6d. net.)

for what we comprehend by Justice, it is essential that from time to time such scrutiny should take place, and no time could be more opportune than the present. The last 50 years have been years of quite revolutionary changes, and today in England the establishment of what is called the Welfare State calls for an examination of the legal problems that are inextricably intertwined with an era of profound change. Nearly 20 years ago Lord Macmillan said, "Law is something much greater and nobler than the contents of any statute book, of any code, of any volume of judicial decisions. It is the guardian and the vindicator of the two most precious things in the world—justice and liberty."

This book of Professor Friedmann is concerned with the same great theme, although he uses no rhetorical phrases. He discusses decided cases, statutes, and legal writings in the most practical way, and is never unmindful of the difficulties that arise in a Planned State. He brings to the discussion his first-hand knowledge of other systems of law and the quality of a richly stored mind.

The book is divided into four parts, but each part is concerned with changes in some branch of the law, and what those changes portend. The changes of the last 50 years in the law of contract, the law of tort, the law of property and in the criminal law, are analysed in great detail in the first part, because Professor Friedmann believes that a great transformation has taken place in the fundamental institutions of the common law. The reader must be left to discover for himself the fascination of the narrative, but an example may be given to demonstrate the method, and, at the same time, to illustrate the central idea of the whole book. In the section dealing with *Recent Trends in the Law of Torts*, the author traces the development of the law in the field of manufacturer's negligence since *Donoghue* v. *Stevenson* in 1932. He shows how the term "manufacturer" has been given a very wide interpretation; how the word "dangerous" has been stripped of all distinctive meaning; how the use of the maxim *res ipsa loquitur* has increased the burden on the manufacturer as in *Grant* v. *Australian Knitting Mills*, by shifting the burden of proof, in effect, to the defendant; and how the construction of "opportunity of inspection" has been made to mean "reasonable necessity for" and not "physical opportunity of." These, clearly, are very notable changes. In the *Australian Knitting Mills Case*, for example, the plaintiff was unable strictly to prove negligence; the defendants had sold over four million garments of the like kind without any complaint of any sort; yet the manufacturer was held to be under the necessity of showing that a cause outside his sphere of responsibility had intervened. From similar illustrations in various branches of the law, Professor Friedmann is led to the conclusion that a whole series of torts, headed by negligence, and concerned principally with the liability of manufacturers, occupiers of land and other property owners, are slowly but inevitably converging into a general broad

principle of legal responsibility towards the public, flowing from the control of property. His conclusion, therefore, is that *Donoghue* v. *Stevenson* was a provisional attempt to adapt legal responsibilities to new social conditions; and that it cannot remain confined to the manufacturer-consumer relationship.

That adaptation through the whole realm of law is the subject discussed with freshness and vigour throughout these pages, and with the lucidity that comes " from a busy and prolonged acquaintance with the subject on hand " as another Stevenson once said.

This leads him directly to another question that in one form or another keeps breaking in at all stages of the argument, and which he plainly believes to be of surpassing importance, the question of judicial interpretation. Professor Friedmann is a legal reformer, and, it would appear, something of a social reformer too. When the Court of Appeal in 1927 had to deal with a case under the provisions of the Housing Act of 1925, where the lessors of houses below a certain rateable value were under a statutory duty to keep the houses " in all respects reasonably fit for human habitation," the majority decision of the court comes in for quite severe condemnation. A defective sashcord had broken and the plaintiff in consequence injured his hand, but the court said that that did not prevent the house being " reasonably fit," and one of the members of the court went the length of saying that any different view would be " somewhat fantastic." When in 1943 the identical facts came up for consideration again, the House of Lords said the house was *not* reasonably fit, and Professor Friedmann writes with a kind of suppressed indignation of the decision of 1927, and makes two separate references to it. The House of Lords decision is an illustration he says of " adopting the social policy rule in interpreting a statutory rule containing phrases of general social significance." On the other hand, one of the Lords Justices in 1951 is highly commended for his " valiant " attempt to apply the principle of *Donoghue* v. *Stevenson* to the case of negligent preparation of accounts by a firm of chartered accountants, who knew that the plaintiff was relying on their statement to decide whether or not he should invest his money. And Professor Friedmann reserves his highest praise for men like Lord Wright, Lord Atkin, and Sir George Jessel " as having tended to interpret the judicial function as one of active assistance in the progressive development of the law."

Then again, to illustrate his main theme Professor Friedmann shows how the liability of employers to employees has been similarly expanded and extended through the development of common law liabilities by the courts, and by the interpretation of modern statutes. Perhaps the most quoted case in the courts today, *Wilsons and Clyde Coal Co. Ltd.* v. *English*, is approved by Professor Friedmann on the ground that it left but few cases of accidents arising in the course of industrial employment where the employer was not liable,

once negligence had been found. The narrowing down of the scope of certain legal rules " obnoxious to modern social conscience and public policy " in this field of the law is also approved, as in the instance of the steadily increasing resistance to the defence of *volenti non fit injuria* and the opposition to the rule of common employment.

The second part of the book deals with the role of public law in the English legal system, and discusses the most interesting and important question of the legal position of public corporations, and what Professor Friedmann calls " the characteristically English attempt at blending the public ownership and management of industries and other public services with elements of private law and individual enterprise."

The third part of the book discusses some aspects of statute law in the light of modern developments. This is a particularly valuable part of the book because the statutes of recent years cover immense fields of corporate economic and social activities; and the proper interpretation of these statutes becomes a matter of the very highest legal and social importance. Lord Wright, who in 1937 had written rather disparagingly of this branch of the law, is respectfully challenged; and Professor Friedmann discusses with great learning the various types of " legal approach " and the traditional methods of interpretation in English jurisprudence. He suggests that the vacillation between one type of interpretation and another has been productive of the most unfortunate results in many fields of law, and suggests further that whilst in a free society there is no master solution to resolve judicial difficulties, some assistance may be derived from differentiating the statutes to be construed for the purposes of interpretation, and proceeds to indicate the statutes he has in mind, and the methods of interpretation he suggests should be applied.

The final part of the book is in some respects the most important of all. It deals with the question of how the enormously increased activities of the modern State can be reconciled with the tradition of the common law, and the preservation of those individual rights which are indissolubly bound up with the British tradition.

This book, then, is clearly a most stimulating and provocative study of the law in relation to social changes in Great Britain. No doubt it will give rise to much disputation, because politics, and indeed party politics, enter so largely into the questions of social change. It is not given to everybody to approve the design and building of the Jerusalem set up in England's green and pleasant land. That makes it all the more desirable that this book should be widely read. The days are gone (if ever they existed) when lawyers could say that they lived in a world of their own into which particular social or political trends did not intrude. Whether lawyers like it or not, social and political trends have intruded in the past, and will continue to intrude with growing intensity in

the future. Lawyers cannot emulate Mrs. Partington, though Professor Friedmann seems to think that even the House of Lords cannot boast of a blameless record. When the courts had to deal with the rule of common employment, they formulated a legal policy over the years based on the view that the rule was out of harmony with modern conditions of industrial employment, and out of harmony too with the ideas of social justice which generally prevailed. Therefore, everything was done to limit the scope of the rule until its welcome abolition in 1948. Social and political trends had in fact intruded. "The accepted standards of right conduct," to use the words of Mr. Justice Cardozo, inevitably shape the progress of the law. In the last quarter of a century the shift in judicial opinion in the interpretation of Tax Statutes is most marked, and from condonation of legal attempts to avoid taxation the change has been made to condemnation, as may be seen from comparing the language of Lord Sumner in 1928 with that of Lord Greene in 1942, or that of Lord Simon in 1943. Is this due to a change of social conscience and the acceptance of a different conception of state functions? And is this reflected in the later pronouncements? It would be idle to complain about omissions from this book, when so much has been given, but a discussion of Family Law would have been most welcome in a book devoted to important social changes. Perhaps one may conclude by regretting that the price of the book is as high as 37s. 6d. No doubt it is the best illustration of social change; but many young lawyers will be precluded from buying it, which is a pity, for the idealism and fervour of Professor Friedmann must be an encouragement and inspiration to younger lawyers in particular.

The book ought to be in the library of every lawyer.

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[1] The Rt. Hon. Sir Norman Birkett was appointed a judge of the High Court of Justice in 1941 and a Lord Justice of Appeal in 1950.

LEGISLATURE AND JUDICIARY

Reflections on the Constitutional Issues in South Africa: Part I

Though the judgment of the South African Court of Appeal in the recent case of *Harris and Others* v. *Minister of the Interior* [1] is significant primarily in the law and politics of South Africa, it may be expected to influence the understanding and interpretation of the Statute of Westminster throughout the Commonwealth. Moreover, there is much in the judgment of interest for general jurisprudence and political theory. Very rarely are courts of law required to examine legal principles that may fairly be described as " ultimate " —yet, directly or indirectly, the issues in *Harris' Case* belong to this category. The arguments addressed to the court, the actual decision, and the controversy to which it has given rise, touch and range across the uncertain boundaries that mark off law from politics and history.

Such being the nature of *Harris' Case*, it is probably too early yet to assess its full significance. Certainly, adequate discussion of every major point which was, or has been alleged to be, involved in the litigation is not practicable within the reasonable limits of a law review.[2] Of necessity some selection must be made, and it has seemed to the writer that he may usefully attempt three things. First, to review briefly what the Appeal Court considered to be the real issues, and its decision thereon. This is perhaps more than usually appropriate, because much confusion has been imported by the use, in various contexts, of that slippery and delusive term sovereignty. Thus, it has been said that the decision in *Harris' Case* denies the sovereignty of South Africa as a State, impairs the sovereignty of South Africa's legislature, and thwarts the sovereign will of the South African people. Each of these assertions, in the writer's submission, is unsound; and, in the aggregate, they obscure what the case was really about. To establish this criticism is the second object of this article; and the third is associated with it.

In the argument addressed to the court on behalf of the Minister of the Interior, reliance was placed, by way of analogy, upon a number of propositions concerning the nature of the United Kingdom Parliament and its relationship with the British courts, which

[1] 1952(2) S.A. 428. The case is also reported in [1952] 1 T.L.R. 1245. Comment in this article will be confined to the judgment of the Appeal Court on the Separate Representation of Voters Act, which was given in March, 1952. It is not proposed to discuss the issues in the further litigation now pending between the same parties, which has arisen out of the passing of the " High Court of Parliament Act."

[2] Part of the field has been dealt with in the writer's *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act*, Juta, 1951.

were said to be implicit in a true view of Parliamentary Sovereignty. These propositions were [3]: (i) that a court of law cannot take any note of the procedure in Parliament whereby a Bill came to be enacted; (ii) that a measure which appears on the Roll of Parliament is good law, whatever the method adopted for its passage; (iii) that a Sovereign Parliament cannot bind itself as to the form of subsequent legislation, and, therefore, the provisions of a later Act, so far as they are inconsistent [4] with an earlier Act, must prevail; and (iv) that a legislature can only rank as sovereign if there is one manner of law-making which the constituent elements of that legislature can always adopt in legislating. Reasons will be given, however, to show why the position in Britain was irrelevant and, in any event, inconclusive.

The law of England received comparatively short treatment in the judgment; for it is hardly the office of judges to expound points which they hold to be irrelevant, however great their intrinsic interest may be. In the pages of this journal, however, ampler discussion may serve a useful purpose; though one may hope to do little more than formulate the main problems in a significant way and suggest the lines along which solutions should be sought.

The Issues in Harris' Case

The Appeal Court was asked in *Harris' Case* to adjudicate upon the validity of a measure known as Act 46 of 1951 (the Separate Representation of Voters Act) which, having been passed by a majority vote in the House of Assembly and in the Senate, sitting separately, received the Governor-General's assent, and was thereafter officially enrolled among the statutes of the Union.[5] This called for a decision upon (a) the nature of the Union Parliament, *i.e.*, its structure, mode of legislating and powers and (b) the relationship between that parliament and the courts.

The actual order made by the court was that "the measure known as Act 46 of 1951 is invalid, null and void, and of no legal force and effect in terms and by virtue of sections 35 and 152 of the South Africa Act, 1909, as amended." The relevant provisions

[3] The writer quotes the first three from the opinion of Professor E. C. S. Wade, published *in extenso* in the *Cape Times* on March 24, 1952. Professor Wade's opinion was taken by the Union Government before the appeal and was released by the Government for publication after the judgment was announced.

Counsel's way of formulating the second proposition was as follows: "If, from the document, it appears that the measure was passed by both Houses and received the Royal Assent as an Act of Parliament, the courts are bound to accept it as an Act of Parliament." At p. 445.

[4] The inconsistency was not admitted in *Harris' Case*; one of the alternative contentions on the Government's side being that Act 46 of 1951 involved no "disqualification" within the meaning of s. 35 of the South Africa Act. But see note 9 below.

[5] The scheme of the "Act" was to destroy the common voters' roll for Europeans and non-Europeans; and to create two new and mutually exclusive rolls, one for Europeans and another for non-Europeans—each class of voters to elect, separately, a number of members of the House of Assembly.

of these sections of the South Africa Act, commonly known as the entrenched sections,[6] provide, in effect, (i) that no law which disqualifies certain persons from enjoying certain franchise rights, on the ground of race or colour only, shall be valid unless passed by a two-thirds majority vote of the total membership of the Senate and of the House of Assembly in joint session—section 35[7]; and (ii) that no amendment or repeal of the two-thirds majority procedure, where in terms of the South Africa Act it is required to be used, shall itself be valid unless passed by that procedure—section 152.[8]

The court had no difficulty in deciding that the Separate Representation of Voters Act provided for the "disqualification" of voters within the meaning of section 35 of the South Africa Act.[9] It held, moreover, that the provisions in sections 35 and 152, prescribing that such a measure should be invalid unless dealt with by

[6] There is another "entrenched section," namely s. 137 of the South Africa Act, which provides for the equality of the two official languages.

[7] s. 35 of the South Africa Act, as amended by s. 44 of Act 12 of 1936 (which dealt with Cape Native voters), is as follows:

"35.—(1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person (other than a Native, as defined in s. 1 of the Representation of Natives Act, 1936) in the Province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only or disqualify any Native, as so defined, who under the said Act would be or might become capable of being registered in the Cape Native voters' roll instituted under that Act from being so registered, or alter the number of the members of the House of Assembly who in terms of the said Act may be elected by the persons registered in the said roll, unless the Bill embodying such disqualification or alteration be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

"(2) No person (other than a Native as so defined) who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour."

[8] s. 152 of the South Africa Act is as follows:

"152. Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further than no repeal or alteration of the provisions contained in this section, or in ss. 33 and 34 (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in ss. 35 and 137, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament."

[9] The court took the view, which seems clear enough, that the object of s. 35 was to ensure that, unless the unicameral two-thirds majority procedure were used, registration on *any* voters' roll in the Cape Province was not to be conditioned by, or made dependent on, race or colour. The "Act," therefore, "disqualified" both Europeans and non-Europeans from remaining on a common roll on the ground of their race or colour. See p. 455 of the judgment.

the two-thirds majority procedure, are rules of law which are still of full force and effect, notwithstanding the passing of the Statute of Westminster or any other event that has occurred since the formation of the Union, and that it is the court's duty to take cognisance of such law. Act 46 of 1951 should, therefore, have been dealt with by the two-thirds majority procedure. It was common cause, however, and also clear *ex facie* the measure,[10] that it had not been so dealt with; and it followed, in the court's view, that it should be declared invalid and void of legal effect.

That, in outline, is what the court decided. By what process of reasoning was the decision reached?

At the outset, their Lordships were faced with a choice between two fundamentally different methods of approach. They were asked by counsel for the Minister to treat the questions before the court as depending for their solution upon a true view of the British doctrine of Parliamentary Sovereignty. He argued that, subject to one exception, the Union Parliament had been created as an exact replica of the United Kingdom Parliament. The exception was that between the years 1910–31, there existed certain fetters upon the legislative power of the Union Parliament; among them, in his submission, the requirement of observing the procedure in the entrenched sections. But, with the passing of the Statute of Westminster, all fetters fell away, and thereupon, he argued, the Union Parliament took the place of the Parliament of the United Kingdom as the sovereign legislature in the Union. It followed—so the argument ran—that the relation between the Union Parliament and the courts came to be the same as the relation between the United Kingdom Parliament and the British courts. Having thus sought to introduce the concept of British Parliamentary sovereignty, counsel contended that it "supplied all the answers." No British court could question the validity of the Separate Representation of Voters Act, had it

[10] It was said by Centlivres C.J. at p. 469, that "had Act 46 of 1951 stated that it had been enacted by the King, the Senate and the House of Assembly in accordance with the requirements of ss. 35 and 152 of the South Africa Act, it may be that courts of law would have been precluded from inquiring whether that statement was correct." But, as observed by the Chief Justice at p. 469, "the original of the Act signed by the Governor-General and filed . . . bears the certificate of the President of the Senate and the Speaker of the House of Assembly, to the effect that it was passed by the Senate and the House of Assembly respectively. This shows clearly that the Act was not passed by the Senate and the House of Assembly sitting together." It may be added by way of explanation that at a joint session the Speaker of the Assembly presides (s. 58 of the South Africa Act); and that in all cases since Union where Bills have been passed in joint session, the original bears only the written assent of the Governor-General and the certificate of the Speaker.

In other words, to quote the language of an early English case, *The King and Hunsdon* v. *The Countess of Arundel* (80 E.R. 258), the measure "carried its death wound in itself." A number of important points are involved here; as will be seen when, in the second part of this article, we come to consider the law on the question of the extent to which a court will pursue its inquiry into the authenticity of a document purporting to be an Act of Parliament. It will be necessary to discuss the legal effect of the enacting clause, of the Governor-General's assent, and of the fact of enrolment.

been passed by the United Kingdom Parliament; therefore, he contended, no South African court should do so.

The court rejected this argument. It was not prepared to accept as self-evident the major premise upon which it is based, namely, that the Union Parliament has always been a replica of the United Kingdom Parliament in regard to its mode of legislating. On the contrary, it found the premise to be false. The Union Parliament, their Lordships held, is, and always has been, different in *kind* from the United Kingdom Parliament; and this, as we shall see presently, is the key to the understanding of the whole inquiry.

The court began its reasoning with the incontrovertible fact that the Union of South Africa and its Parliament were created by a specific document, namely, a Statute of the United Kingdom Parliament, known as the South Africa Act, 1909. It was, therefore, by reference to the exact terms of that document that the main problems in the case were, in the first instance, to be resolved. It would then be necessary to inquire whether any subsequent event, more particularly the Statute of Westminster, had brought about any relevant change. If an inquiry along these lines involved a finding that one could not properly attach the label " sovereign " to the Union Parliament, that would be a *result* (which may or may not be deplored) of determining the real issues in the case; the abstract question of sovereignty, however, was not itself involved.[11]

Approaching the matter from this point of view, the court recognised that the particular Parliament which had been created for the Union by the South Africa Act, differed, at the moment of its creation, from the United Kingdom Parliament in two relevant respects: (a) in regard to its powers, and (b) in regard to its mode of legislating. As regards legislative power, it was common cause that the Union Parliament began its career with certain limitations,[12] whereas, in the case of the United Kingdom Parliament, it had been clear since the seventeenth century that there were no laws which were beyond the power of Parliament to make or unmake.[13]

The second point of difference, however, is the one to note: it was keenly disputed in the argument before the court, and, in the result, proved to be decisive. The component elements of the Union Parliament are declared in the South Africa Act to be three in number, namely—as in the case of the United Kingdom Parliament—the Queen, an Upper House (the Senate) and a Lower House (the House of Assembly); but the manner in which these elements are required to combine for action in order to legislate, differs radically under the South Africa Act from the position in Britain.

[11] The question whether the Union Parliament may properly be described as a sovereign legislature will be discussed in the second part of this article.

[12] These limitations were (a) the overriding authority of the Imperial Parliament; (b) an incapacity to legislate in conflict with the terms of the Colonial Laws Validity Act, 1865; and, possibly, (c) an incapacity to legislate with extra-territorial effect.

[13] The point will be more fully discussed in the second part of this article.

Whereas in Britain all legislation on every topic may competently be made by the assent of the Queen and a majority vote of the Lords and the Commons, sitting separately,[14] in South Africa, the three elements of the Union Parliament are required to combine for action in different ways for different legislative purposes. Thus, the ordinary run of legislative business may competently be carried out in South Africa in the same way as in England, *i.e.*, bicamerally by the Houses sitting separately. In the case of a deadlock between the Houses, however, the procedure is by way of a joint session and a simple majority vote [15]; and finally, for the purposes of legislation coming within the ambit of the entrenched sections, the appropriate procedure is a joint session and a two-thirds majority vote.

In other words, the concept of parliament, as a law-making body in action,[16] is a different and more complex concept in South Africa, than in Britain. The court recognised that, having regard to the position of the Union Parliament at the time of its inception, the provisions of the entrenched sections were part of the definition of the Union Parliament,[17] and not a limitation upon the powers of an exclusively bicameral parliament, which could be assumed to function in the same way as the United Kingdom Parliament.[18]

The next stage in the inquiry was to ascertain whether any event had occurred since union to change the Union Parliament's method of enacting valid legislation. And, in this regard, there was one event, and only one, which was seriously relied on by counsel for the Minister: namely, the passing of the Statute of Westminster. He submitted that there were two reasons why

[14] The provisions of the Parliament Acts, which authorise legislation by the Queen and the Commons, will be considered later.

[15] The procedure upon a deadlock is set out in s. 63 of the South Africa Act.

[16] See *Parliamentary Sovereignty, etc.*, at pp. 5–8. The definition of Parliament, both in the United Kingdom and in South Africa, by reference (a) to the designation of the component elements in whom legislative power is vested, and (b) to the manner in which that power must be exercised, will be elaborated in the second part of this article.

[17] At pp. 463–5. See also pp. 289–90 below.

[18] This point was stoutly disputed by counsel for the Minister of the Interior, who argued, inter alia, that a measure passed in joint session in terms of the South Africa Act, was prima facie not an Act of the Union Parliament; and could only rank as such by virtue of the provisions of the Act which state that such a measure " shall be taken to have been duly passed by both Houses of Parliament." See ss. 35, 63, and 152.

There are a number of answers to this. Thus: (i) note that the wording is not " shall be taken to have been passed by Parliament," but by both Houses of Parliament; (ii) in a case where a measure is duly passed in joint session notwithstanding the disapproval or *total absence* of all Senators—which is quite possible, when account is taken of the numbers of the membership of the respective Houses—the " deeming clause " would avert a contention that one of the constituent elements of Parliament, namely the Senate, had not functioned; (iii) the deeming clause may also have been inserted to avert a contention that it was necessary for legislation, duly passed in joint session, to be passed, *in addition*, bicamerally in the ordinary way; and (iv) the clause was peculiarly appropriate in the deadlock section (s. 63), and it made for tidy draftsmanship to include it in ss. 35 and 152 as well. In this regard, a perusal of the various drafts of the South Africa Act reveals that the deeming clause first appeared in the deadlock section and not in the other sections.

that statute had deprived the entrenched sections of their efficacy. First, he contended that the force of those sections had depended entirely upon the operation of the Colonial Laws Validity Act, 1865, and so fell away when in 1931, by virtue of section 2 (1) of the Statute of Westminster, that Act ceased to apply. Secondly, the Statute of Westminster, as a whole, and more particularly section 2 (2) thereof, had conferred new powers upon the Union Parliament and, in so doing, had changed the character of the entrenched sections.[19] Elaborating this latter submission, he argued that whereas before the Statute of Westminster the unicameral two-thirds majority procedure was obligatory for legislation falling within the ambit of those sections, it was now optional for the Union Parliament to legislate bicamerally or unicamerally, or in any way it pleased, no matter what the subject-matter of the legislation might be. In the result, to quote counsel's phrase, "the sting had been taken out of the entrenched sections." And, in support of these submissions, he relied, in the main,[20] on a series of decisions of the Privy Council on the interpretation of the Statute of Westminster, of which the chief was *Moore* v. *Attorney-General for the Irish Free State*[21]; the absence of saving sections in the Statute of Westminster in relation to the Union[22]; and the decision of the South African Appeal Court in the case of *Ndlwana* v. *Minister of the Interior*.[23]

It would be of interest to discuss in detail the court's findings on each of these points and to follow up their bearing in the law of the various Commonwealth countries. It is certainly tempting to dwell a little on those parts of the judgment which decide that the events leading up to the passing of the Statute of Westminster are

[19] s. 2 (2) of the Statute of Westminster is as follows:
"No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, *and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.*" (The italics are the writer's.)

[20] Counsel for the Minister did not seek to support his case in any way by reference to the Status of the Union Act, 1934, s. 2 whereof roundly declares that "The Parliament of the Union shall be the sovereign legislative power in and over the Union." The reason why the Status Act did not assist his argument appears clearly from the following passage in the judgment of Centlivres C.J. at p. 464; "During the course of the argument, Mr. Beyers correctly stated that the Status Act carried the matter no further. If the Statute of Westminster did not have the effect of repealing or modifying the entrenched clauses of the South Africa Act, then those provisions remained intact after the Statute was passed, and the Union Parliament could not by means of an Act, like the Status Act, passed bicamerally, repeal or modify those entrenched clauses."

[21] [1935] A.C. 484.

[22] See, in relation to the Constitutions of Canada, Australia and New Zealand, ss. 7, 8 and 9 of the Statute.

[23] [1937] A.D. 229.

admissible in aid of its interpretation [24]; that the efficacy of the entrenched sections has never depended on the existence of the Colonial Laws Validity Act, and that, accordingly, the repeal of that Act by the Statute of Westminster was irrelevant [25]; that neither the absence of saving clauses in the Statute of Westminster in relation to the Union nor the decision in *Moore's Case* assisted the Government's argument; and that the Court of Appeal should not hesitate to declare an error in its previous decision in *Ndlwana's Case* if it was clear that an error had been made.[26] But these topics have been discussed by the writer elsewhere and further comment must wait another occasion. The essential object of examining the effect of events that have occurred since the formation of the Union, was to ascertain whether the Union Parliament's mode of legislating, as established by the South Africa Act, had been changed in any relevant and material respect. And it must suffice here to elucidate the court's findings on this point.

The essence of the matter is contained in the following passages of the judgment of Centlivres C.J., who delivered the unanimous decision of the court:

> " . . . It is the South Africa Act, and not the Statute of Westminster, which prescribes the manner in which the

[24] At p. 457. The historical material referred to by counsel on both sides, and by the court, included: the reports of (a) the Imperial Conference of 1926, (b) the Conference on the operation of Dominion Legislation, 1929, (c) the Imperial Conference of 1930, and (d) the resolution of the Union Senate and House of Assembly, authorising the enactment of the Statute of Westminster. See, generally, on this subject, Professor W. P. M. Kennedy's essay entitled " Interpreting the Statute of Westminster " in *Essays in Constitutional Law*; and the writer's *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act, supra*, at pp. 24–28. And see note 48 below.

[25] The court disposed of the argument based on the Colonial Laws Validity Act by holding that the provisions of that Act did not apply to " the repeal or alteration " *of the South Africa Act*, because such repeal or alteration was specifically dealt with, and authorised, by s. 152 of the South Africa Act—a *later* Act of the Imperial Parliament. (*Cf. Parliamentary Sovereignty, etc., supra*, p. 17, note 44.)

It is submitted that, in any event, the question of repugnancy just could not arise. A unicameral amendment of the entrenched sections, in terms of its provisions, would be consistent with, not repugnant to, those provisions. On the other hand, bicameral " legislation " within the ambit of the entrenched sections would not be " repugnant legislation " in terms of the Colonial Laws Validity Act: it would simply be invalid in terms of the South Africa Act, there being no need to look beyond the South Africa Act itself to reach this conclusion. See *Parliamentary Sovereignty, etc., supra*, at p. 19.

[26] The judgment in *Harris' Case* sheds valuable light on the subject of judicial precedent in South Africa. It has been said that in refusing to follow its previous decision in *Ndlwana's Case* [1937] A.D. 229, the court introduced intolerable uncertainty into the law, because a subsequent bench of judges may prefer *Ndlwana's Case*. The point is bad. As Centlivres C.J. observed in *Harris' Case*, he was not in the invidious position of preferring his own reasons to those of his predecessors; because in *Ndlwana's Case* categorical statements were made (a) without *any* reasons being given; and (b) without hearing argument for or against the main conclusion at which the court arrived; namely, its interpretation of the Statute of Westminster. See at pp. 468, 471. This could certainly not be said by any subsequent court about the carefully reasoned decision in *Harris' Case*, which was given after six days of thorough argument. See also note 38 below.

> constituent elements of parliament must function for the purpose of passing legislation. . . .[27] The words ' Parliament of a Dominion ' in the Statute of Westminster must, in my opinion, be read, in relation to the Union in the light of the South Africa Act . . . one is doing no violence to language when one regards the word ' parliament ' as meaning parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act. . . .[28] Once it is clear that parliament means parliament functioning in accordance with the South Africa Act, the concluding words of the subsection carry the matter no further." [29]

In other words, in considering the effect of the Statute of Westminster on the status of the Union Parliament, the first and fundamental question was: " What is the Union Parliament? " And the answer to that question, their Lordships held, was to be found today, as in 1910 when the Union was formed, in the South Africa Act. The two-thirds majority procedure was part of the definition of the Union Parliament; and it was for this reason that a grant of power to " parliament " in the Statute of Westminster carried the matter in issue no further.[29a] Indeed, it was correct to say that before the passing of the Statute of Westminster the Parliament of the Union, functioning in terms of the South Africa Act, had complete power to amend the entrenched sections.[30]

The court clearly appreciated the fact that the Statute of Westminster had enlarged the powers of the Union Parliament, duly functioning in terms of the South Africa Act. Thus, it removed all restrictions then existing upon the power of that parliament to legislate repugnantly to British statutes.[31] Further, it removed any inability that might have existed on the part of the Union Parliament to legislate with extra-territorial effect.[32] And, finally, it terminated the legislative supremacy of the British Parliament in South Africa.[33] But one effect it did not have, and that was to change the definition and mode of legislating of the Union Parliament as set out in the South Africa Act.

Having reached the conclusion that the entrenched sections had been left intact by the Statute of Westminster, it followed, in their Lordships' opinion, that they had power to declare the Separate Representation of Voters Act invalid. This is an aspect of the subject which will be elaborated in the second part of this article. Here it is relevant and sufficient to note that in 1930 in the case of *Rex* v. *Ndobe* [34] the South African Court of Appeal had specifically

[27] At p. 464.
[28] At p. 463.
[29] At p. 465.
[29a] See the writer's *Parliamentary Sovereignty, etc.*, pp. 23–4.
[30] At pp. 462–3.
[31] At pp. 461–2.
[32] At p. 460.
[33] At p. 460. See below, pp. 292 and 294, note 47.
[34] [1930] A.D. 484.

rejected a contention (based on the privilege of the Houses of Parliament to be the sole judges of the lawfulness of their own internal proceedings) that the courts had no jurisdiction to inquire into the observance of the entrenched sections. Thus, as de Villiers C.J. then said [35]:

> "This is a contention with which we cannot agree. Under section 58 of the South Africa Act, each House of Parliament is free to prescribe its own rules with respect to the order and conduct of its business and proceedings. Into the due observance of such rules this court is not competent to inquire. But whether an Act has been validly passed by Parliament is another matter."

In the subsequent case of *Ndlwana* v. *Minister of the Interior*,[36] however, Stratford A.C.J., held that, in consequence of the passing of the Statute of Westminster, "the procedure express or implied in the South Africa Act is so far as courts of law are concerned at the mercy of parliament like everything else." And he sought to put aside the judgment in *Ndobe's Case* in a single sentence:

> "It is not necessary," he said, "to refer to the case of *Rex* v. *Ndobe* since that case was decided before the Statute of Westminster."

But, as the Appeal Court has now so clearly shown in *Harris' Case*,[37] if the contention that the courts had no jurisdiction on the ground of Parliamentary privilege was unsound before the Statute of Westminster, it was equally unsound thereafter. The Statute of Westminster certainly did not purport to introduce new law into the Union on the subject of *lex et consuetudo Parliamenti*. Accordingly, once it was clear, upon a proper construction, that that statute did not either expressly or impliedly modify the internal machinery for law-making in South Africa,[38] it followed, in the words of Centlivres C.J., that "the principles enunciated in *Rex* v. *Ndobe* are still sound law, *viz.*, that courts of law have the power to declare Act 46 of 1951 invalid on the ground that it was not passed in conformity with the provisions of sections 35 and 152 of the South Africa Act."

We are now in a position to go on to the wider questions of sovereignty which are said to have been involved. And, at the

[35] At p. 457.
[36] [1937] A.D. 229, at pp. 236, 238.
[37] At pp. 469–70.
[38] At p. 469. One of the vital mistakes, the court held, that was made in *Ndlwana's Case*, *supra*, was that Stratford A.C.J. assumed, without argument on the point, that the Statute of Westminster had brought about a most material change in regard to South Africa's internal machinery for legislating. *Per* Centlivres C.J. at p. 471. It was erroneously assumed that the Statute of Westminster transformed the Union Parliament from a legislature which functions in the manner described earlier in this article into an exact replica of the United Kingdom Parliament. See *Parliamentary Sovereignty, etc.*, pp. 43 *et seq.*

outset, it seems necessary to call attention to an elementary distinction between the sovereignty (or independence, to use the better word in this context) of a State, and the sovereignty of its legislature; for these two different ideas have been naïvely confused in the South African controversy. Discussion of the sovereignty of South Africa *qua* State will occupy the space allotted to this part of the article. In the second part we shall discuss the sovereignty of the Union legislature and the notion of the "sovereign will of the people."

State Sovereignty

It is clear that when we say that a State is sovereign all we mean is that no other State may competently interfere in its affairs. The fact that a particular country does or does not possess a sovereign legislature is irrelevant to the question of State sovereignty. The textbook example is, of course, the United States of America—a sovereign State in which the search for a single organ of government with sovereign legislative power is generally regarded by lawyers as being both pointless and futile.[38a] In short, independence is the sole criterion of State sovereignty.[39] The Appeal Court went out of its way to remove misapprehension on this point and stressed the fact that South Africa is today a sovereign State. "The only legislature," their Lordships held,[40] "which is competent to pass laws binding in the Union is the Union Legislature. There is no other legislature in the world that can pass laws which are enforceable by courts of law in the Union. . . . The Union is an autonomous State in no way subordinate to any other country in the world." The interesting feature of this conclusion is that it involved a finding that the Statute of Westminster contained a legally irrevocable withdrawal or abandonment of legislative power in the Union on the part of the Imperial Parliament—at any rate in the eyes of the South African courts. And, it may be worth while—without quarrelling with that conclusion—to consider the point a little more closely later; but for the moment it suffices to note that counsel for the Minister fully accepted this position.[41]

On what possible ground, then, could it be contended that the continued efficacy of the entrenched sections impairs the sovereignty

[38a] This will be further discussed in the second part of the article.

[39] The books and cases sometimes distinguish State sovereignty from legislative sovereignty by designating the former "external sovereignty" and the latter "internal sovereignty." Thus, as Innes C.J. observed in *R.* v. *Christian* [1924] A.D. at p. 106: "Sovereignty is exercised in two directions; internally it relates to the power of making and enforcing laws, externally to freedom from outside control." Mr. J. D. B. Mitchell makes the point crisply in an article in the *Juridical Review*, 1951, pp. 70–71.

[40] At pp. 467–8.

[41] "Freedom once conferred cannot be revoked" said Stratford A.C.J. in *Ndlwana's Case* [1937] A.D. at p. 237; and, as counsel for the Minister emphasised, he accepted every line, every word and every comma of that decision. Stratford A.C.J. seemed to regard his statement as non-contentious. But see note 47 below in regard to the position in English law.

of South Africa *qua* State? And, in any event, what had the subject of State sovereignty to do with the case? Let us take these questions in turn.

The reasons that have been put forward to support the contention that the efficacy of the entrenched sections impairs the sovereignty of South Africa *qua* State, are difficult to deal with crisply, mainly because they are intrinsically so nebulous and have been so vaguely formulated. Thus, it was argued on behalf of the Minister of the Interior that if the Union Parliament is not able to function in exactly the same way as the British Parliament for all purposes, then South Africa cannot be a sovereign State " unless it breaks completely with its past and abolishes the monarchy." The court rejected this argument on the ground that it seemed to be based on the fallacy that unless a State possessed a legislature of the same kind as the British Parliament it was not a sovereign State—a proposition which their Lordships felt might be just a trifle surprising in the United States of America; and, one might add, in the great majority of the sovereign independent States of the modern world. In fact, counsel's submission seems to have telescoped at least two contentions into one; and each should be disentangled.

The first point was the erroneous submission to which the court referred and which it disposed of. The second point lurks in the phrase " unless it breaks with its past. . . ." What seems to be implied here is that South Africa cannot be regarded as a sovereign State unless its system of law and government can be shown to have a South African root. It will be remembered that their Lordships took the view that the whole inquiry into the nature of the Union Parliament was to be resolved by considering the interpretation and legal effect of two statutes of the British Parliament: the South Africa Act and the Statute of Westminster. And, in the result, the court held that the law governing the Union Parliament's mode of legislating was to be found in the South Africa Act, the terms of which were still operative in the Union.[42] But why, it may be asked, is the South Africa Act still law in the Union? Does it rest on the authority of the British Parliament? Is it law because the British Parliament says so in the present imperative? If not, on what basis does its authority rest?

These are no doubt interesting questions, but it is essential to observe that they were irrelevant to the determination of the issue before the court in *Harris' Case*; for it was common cause between the parties to the litigation that the South Africa Act *is*, in fact, still good law in the Union today; the dispute being solely as to its interpretation. The question why it is law only arose incidentally during the argument, and very little attention was given to it either by counsel or by the court.

It is important to note, too, that the question why the South Africa Act is law in the Union today is not primarily a legal question.

[42] At p. 464.

As Kelsen,[43] and before him, Salmond [44] and particularly Bryce,[45] have so clearly perceived, the process of tracing back the authority of the rules of a legal system must ultimately reach a point beyond which the lawyer cannot go. There comes a point when the question why is this or that the law can receive only one answer. "It is the law," to quote Salmond, "because it is the law and for no other reason that it is possible for the law itself to take notice of." [46] In every legal system there are certain rules which are "ultimate," in the sense that beyond them lie only those forces of history, of ethics and of politics, upon which all law rests.

It may be accepted that the ultimate law-making authority in South Africa today—certainly in the eyes of the Union courts—is the Union Parliament, and that there is no other legislature in the world whose decrees will be recognised in the Union.[47] But the

[43] See, for example, *General Theory of Law and State*, Harvard.
[44] *Jurisprudence*, 10th ed. at p. 155.
[45] *Studies in History and Jurisprudence*, Vol. 2, pp. 52, 57. [46] *Op. cit.*, p. 155.
[47] There is little doubt that in the eyes of the South African courts the Statute of Westminster has resulted in a formal break in the continuity of the South African legal system; for whereas before 1931 the British Parliament was recognised (in theory at least) as having ultimate law-making authority in South Africa, that is no longer the position. See *Harris Case* at pp. 460, 467. It is most unlikely that a South African court would have enforced a British statute, purporting to extend to the Union, if it had been passed between 1931 and 1934, and it were clear that the request and consent of the Union Government had not been obtained in terms of s. 4 of the Statute of Westminster. And, since 1934, any doubt on the subject seems to have been removed by the Status of the Union Act, which enacts that no Act of the British Parliament passed after the coming into force of the Statute of Westminster "shall extend, or be deemed to extend, to the Union, as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union." See *per* Centlivres C.J., at p. 467.

The explanation of the break in terms of *English law* presents some difficulty. In *British Coal Corporation* v. *R.* [1935] A.C. 500, at p. 520, Lord Sankey said, *obiter*, that: "the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute of Westminster. But that is theory and has no relation to realities."

This dictum would doubtless have fairly wide support in England; but, with respect, the question is not quite so simple as Lord Sankey would have us suppose. In fact, it has been seriously suggested that there are grounds upon which even an English court should refuse to enforce a measure, purporting to extend to a Dominion, but which, on the face of it, showed that the request and consent of the Dominion had not been obtained. Thus: (1) Sir Owen Dixon (*Law Quarterly Review*, 1935, Vol. 51, pp. 604, 611) and Sir Ivor Jennings (*Law and Custom of the Constitution*, 3rd ed., pp. 145 *et seq.*) have shown how a logical argument could be developed in support of the contention that the Imperial Parliament has validly and effectively re-defined itself, in s. 4, by introducing a new manner of law-making for the Dominions; and (2) Dr. H. V. Evatt, invoking the support of Sir William Anson, inclines to the view that "the courts of the United Kingdom . . . should regard the absence from any Statute of the Parliament at Westminster of the declaration of request and consent by the Dominion to whom it is sought to be applied as effectively preventing such application." See Evatt, *The King and His Dominion Governors*, 1936, at p. 308–9: Anson, *Law Quarterly Review*, 1886, Vol. 2, p. 440. A sovereign Parliament notes Evatt, quoting Anson, may surrender its sovereign powers over a certain area to another person or body. And he adds: "Why should not 'abdication' or 'surrender' be possible upon a functional, as well as a geographical footing?": *op. cit.*, p. 309, note 3.

These questions, however, need not detain us now. They will be discussed in the second part of this article.

fact remains that the definition and essential character of the Union Parliament are set out in specific terms in the South Africa Act, the relevant provisions of which were left intact by the Statute of Westminster.[48] And, if the further question be asked, why should one look to the South Africa Act to ascertain what is the Union Parliament, and the relationship between it and the courts, then doubtless, the historians of the constitution will point to the fact that since the passing of the Statute of Westminster, the provisions of the South Africa Act and the framework of government which it establishes, have been uniformly observed and accepted in the Union. People have regulated their lives under the South Africa Act; they have elected parliaments in accordance with its provisions; those parliaments have been constituted and have functioned in terms of it. And, finally, the courts in their day-to-day work, have acted, and continue to act, on the assumption that the South Africa Act is South African law. In short, the South Africa Act continues in force in the Union by the habit of observance.[49] Whether it will continue in force in the future, on the same basis, is beyond the scope of this article, and, in any event, depends on factors which lie outside the lawyer's field. As Lord Bryce has pertinently observed:—

> "The question, Who is Legal Sovereign? stands quite apart from the questions, Why is he Sovereign? and Who made him

[48] It would be surprising if they had not been left intact; for, as the court pointed out, at p. 464, the alternative interpretation would mean that the Imperial Parliament went out of its way to change the Constitution of South Africa in the teeth of the authoritative voice of the country as recorded in the following resolution, passed by the Senate and the House of Assembly, pursuant to which the Statute of Westminster was enacted: "That on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act, this House, having taken cognisance of the draft clauses and recitals which it was proposed by the Imperial Conference of 1930 should be embodied in legislation to be introduced in the Parliament at Westminster, approves thereof and authorises the Government to take such steps as may be necessary with a view to the enactment by the Parliament of the United Kingdom of legislation on the lines set out in the Schedule annexed." It was relevant, too, in resolving any doubt that arose in interpreting the Statute of Westminster, to note the fact that the South Africa Act, as its preamble states, embodied the terms upon which the pre-Union colonies agreed to unite for purposes of government. It was not lightly to be assumed that the Statute of Westminster was intended to upset the compact of Union by changing the internal arrangement of government.

[49] The writer has never sought to rely on the sort of contention unsuccessfully put forward by Sir Stafford Cripps in *Moore's Case*, *viz.*, that *before* the Statute of Westminster, the South Africa Act could not properly be regarded as a British Act resting on the authority of the British Parliament; and that, accordingly the Colonial Laws Validity Act and the Statute of Westminster could not be said to apply to it. See *Parliamentary Sovereignty, etc.*, p. 48. He accepted fully that, at the time of the passing of the Statute of Westminster, the South Africa Act rested on the authority of the British Parliament, and that the aforesaid Acts applied to it. But what really mattered, in the writer's view, was that there was nothing in the Colonial Laws Validity Act or in the Statute of Westminster which, upon a proper construction, in any way affected the efficacy of the entrenched sections.

> Sovereign? The historical facts which have vested power in any given Sovereign, as well as the moral grounds on which he is entitled to obedience, lie outside the questions with which law is concerned, and belong to history, or to political philosophy, or to ethics; and nothing but confusion is caused by introducing them into the purely legal questions of the determination of the Sovereign and the definition of his powers." [50]

The other question which we have posed about State sovereignty —what had it to do with the case?—can be shortly dealt with. The inquiry before the court concerned the nature of, and the relations between, the internal organs of government in South Africa. State sovereignty was not in issue; and even if it had been, there can be no doubt that in the one field where the topic is important, namely, the field of International Law, South Africa—along with the other self-governing countries of the Commonwealth—has long been recognised as a full and independent member of the family of nations.

The whole subject of State sovereignty was, therefore, beside the point. Before leaving it, however, there is one small matter that may be mentioned. It is clear that the historical origin of the South Africa Act, the fact that in 1909 it was enacted in Great Britain, is irrelevant.[51] If South Africa could be said to be a non-sovereign State, dependent on Great Britain, merely because the origin of the South Africa Act is British, then with equal force—or rather lack of it—it may be said that South Africa is subservient both to Rome and to Holland because the greater part of the law in force in the Union has its origin there.[52]

D. V. Cowen.*

(To be continued.)

[50] *Op. cit.*, p. 57.
[51] *Harris' Case*, at p. 464.
[52] The fact that British statutes, *e.g.*, the Statute of Frauds, continued to run in the United States after the Revolution, as part of American law, has never seriously been regarded as derogatory of the sovereign independence of the United States.

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A STUDY IN THE RELATIONSHIP BETWEEN COMMON LAW AND EQUITY IN CONTRACTUAL MISTAKE

THE starting point for this study is the recent case of *Solle* v. *Butcher*.[1] There, the broad facts were that after making structural alterations in a certain flat the defendant let it to the plaintiff for seven years at a rent of £250 p.a. without having given notice of improvements under the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920, ss. 2 and 3 and 1938, s. 7 (4) which would legally have entitled him to charge the £250 p.a. instead of the previously established standard rent of £140 p.a. The lease having been executed, however, notice under the Acts became precluded.[2] The reason for the omission to give notice was that, following upon some consultation between the parties, it was decided that the structural alterations had so altered the identity of the "dwelling-house" as to make it a "new" dwelling-house and to release the new dwelling-house from the old standard rent. After a little over a year had elapsed, the lessee brought action against the lessor. He alleged that no change of identity had in fact occurred and that the lawful rent of the house was still the standard rent of £140, and claimed recovery of the amount overpaid. By way of counterclaim, the lessor alleged (inter alia) that the lease was entered into in circumstances of common mistake and further was voidable on the ground of innocent misrepresentation and, consequently, he was entitled to eject the lessee. The Court of Appeal held that in fact there had been no change of identity and that therefore the standard rent remained at £140 p.a.; but that the lease, being voidable in equity on the ground of common mistake (though not innocent misrepresentation), would be set aside on terms securing possession to the tenant and the rent of £250 p.a. to the landlord to run, in effect, from the very beginning of the tenant's occupancy.[3] Jenkins L.J. dissented on the ground that the lease contract remained unrescindable because the mistake was one of law.

The bilateral mistake of the parties in the case was variously described by the various learned judges as a mistake relating to (i) the effect of the structural alterations on the identity or nature of the property as being a new or old dwelling-house,[4] or (ii) the

1 [1950] 1 K.B. 671. *Solle*, today, would be otherwise decided though on a different ground in accordance with the House of Lords' decision in *Langford* [1951] A.C. 223.

2 *Solle* v. *Butcher*, *supra*, 690. See also Megarry, *The Rent Acts*, 6th ed., 262–3.

3 In regard to the period before rescission, the £250 was made subject to an appropriate reduction on account of the landlord's failure to do certain repairs.

4 Bucknill L.J. in the instant case, at 686.

(private) right of the lessor to raise the rent without any need to give notice of improvements,[5] or (iii) the effect of the " change of identity rule " and the Rent Restriction Acts on the rent chargeable for the dwelling-house in its altered condition.[6] Before focusing fully on those matters that form the main theme of this study, some remarks need to be made regarding the narrower and more immediate implications of the case. These revolve about the varying views of the kind of mistake that was present in *Solle*, which, in their turn, involve the issue of the distinction between law and fact in the present context, the definition of " private right " in the sense of the rule in *Cooper* v. *Phibbs*[7] and the type of " fundamental fact " illustrated in the instant case.

By section 12 of the 1920 Act the standard rent chargeable for a house falling within the scope of the Rent Restriction Acts is " the rent at which the dwelling-house was let on the 3rd August, 1913, or . . . in the case of a dwelling-house which was first let after the said 3rd August, the rent at which it was first let." By a judicial innovation originating in *Phillips* v. *Barnett*,[8] the Acts have been glossed to the extent that if, as a result of structural alterations, a dwelling-house undergoes a substantial change of identity, the house, as altered, will be regarded as a new " dwelling-house," and the landlord will, in its first post-transformation letting, be free to charge the full supply-and-demand rent which becomes thereupon the standard rent. It has further been held in an unbroken line of rent restriction cases that the question whether a substantial change of identity for the purposes of the Act has been effected or not is a question of fact.[9]

In *Solle* v. *Butcher*, the parties, if one adopt the majority view of the evidence,[10] understood the relevant provisions of the Rent Restriction Acts, understood the change of identity rule, but were mistaken as to the effect of the structural alterations upon the identity of the house. From this primary mistake flowed the secondary mistake that the lessor had by the alterations without more acquired a legal right to ask what rent he pleased in the lease in question.[11] Whilst the law-fact distinction is one incapable of precise delineation in a sentence, a sufficient approximation for the

[5] Denning L.J. *ibid.*, 692, 694–5. Also—*semble*—Bucknill L.J. at 686.
[6] Jenkins, L.J., *ibid.*, 698, 704, 705, 706.
[7] (1867) L.R. 2 H.L. 149.
[8] [1922] 1 K.B. 222. See Megarry, *op. cit.*, 81 *et seq.*
[9] *Phillips* v. *Barnett*, *ibid.*, at 227–8; *Sinclair* v. *Powell* [1922] 1 K.B. 393, 400; *Marchbank* v. *Campbell* [1923] 1 K.B. 245, 250; *Woodhead* v. *Putnam* [1923] 1 K.B. 252, 255; *Sutton* v. *Bayley* [1923] 2 K.B. 694, 700; *Williams* v. *Perry* [1924] 1 K.B. 936, 940; *Barrell* v. *Fordree* [1932] A.C. 676, 681–2; *Eyre* v. *Haynes* (1945) 62 T.L.R. 63; *Ellis* v. *Sisman* [1948] 1 K.B. 653, 665; *Hemns* v. *Wheeler* [1948] 2 K.B. 61, 65–6; *Mitchell* v. *Barnes* [1950] 1 K.B. 448, 451; and *Solle* v. *Butcher*.
[10] For the contrary view taken by Jenkins L.J. see *Solle*, *supra*, 704.
[11] Owing to his view of the facts and consequent mode of expressing the relevant mistake in the case, Jenkins L.J. adopted what I have called the secondary mistake as the primary. See passages cited in n. 7, *supra*.

present purpose to the total effect of the cases is afforded by Williston's suggested definition of a mistake of law as "either ignorance of a rule or principle of law or an erroneous conclusion as to the operation of the law upon a known set of facts."[12] The mistake regarding the identity of the house was one of fact on the authority of the rent restriction cases; also, it is submitted that it was one of fact in the light of Williston's definition since, while the parties were clear about the existence and applied meaning of the relevant law, they misunderstood the nature of the facts to which the law applied. Similarly, it is possible to argue that the misapprehension[13] regarding the lessor's right to take an unfettered rent was not one of law since it arose not from ignorance of the law or of its correct interpretation but from false conclusions of fact.[14] At most, it would seem to have been a mistake compounded of both law and fact and so, for legal purposes, equivalent to one of fact.

In part, Bucknill L.J.'s finding that the circumstances had produced a factual mistake was uncomplicated. The learned Lord Justice concluded: "In my opinion, therefore, there was a common mistake of fact on a matter of fundamental importance, namely, as to the identity of the flat with the dwelling-house previously let at a standard rent of £140 a year and that [*sic*] the principle laid down in *Cooper* v. *Phibbs* applies."[15] The last sentence does, however, introduce a complication. What Bucknill L.J. conceived as the principle in *Cooper* v. *Phibbs* is clear from a preceding passage: "... was this mistake a question of fact or a question of law? In my opinion it was a question of fact, and the principle applies to this case which was laid down by Lord Westbury in his speech in *Cooper* v. *Phibbs* where he said, 'If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.'"[16] From these passages it is, I respectfully submit, a legitimate conclusion that Bucknill L.J. founded his judgment as well on the mistake relating to the lessor's (private) right to charge an unfettered rent as on that relating to the identity of the dwelling-house, but whether the grounds were alternative or cumulative is impossible to assess owing to the disjointed structure of the judgment in this respect.

Denning L.J., on the other hand, treated the mistake in the case as referring solely to the lessor's right in question with *Cooper* v. *Phibbs* as the authority, and on this main ground rested his decision.[17] In this respect then, the effect of the majority judgment,

[12] *Contracts*, § 1581.
[13] Here used as synonymous with "mistake"; *pace* Denning L.J. in *Solle*, *supra*, at 695, whose distinction appears to me, with great respect, to be over-refined for the needs of the law of contractual mistake.
[14] *Cf.* also *National Pari-Mutuel Association, Ltd.* v. *The King* (1930) 47 T.L.R. 111 (*per* Scrutton L.J.).
[15] *Supra*, at 686.
[16] *Ibid.*, at 685.
[17] *Ibid.*, at 692, 694–5.

if followed, is that the meaning of Lord Westbury's statement of law in *Cooper* v. *Phibbs* has been made somewhat more specific, although, as in American law,[18] a wide fringe of uncertainty remains.

Cooper v. *Phibbs* is an important case for a number of reasons.[19] First, it is authority for the exception to the general rule that a mistake arising out of the misinterpretation of a document or of general law is one of law, the exception being constituted where the mistake arising from the misinterpretation refers to the parties' "relative and respective rights" or, at least, to the private rights of ownership.[20] In other words, *Cooper* represents the culmination of the development of equitable doctrine from *Lansdowne* v. *Lansdowne* [21] through *Bingham* v. *Bingham*,[22] *Broughton* v. *Hutt*,[23] and *Cochrane* v. *Willis* [24] to the proposition that a private right, or, at least, a private right of ownership, is a matter of fact, a doctrine taken over by common law.[25] Secondly, it affords an illustrative application of the broad equitable principle which is—apart from important remedial differences—the same as at common law, that where there is a bilateral mistake regarding a fact that is "fundamental" or "essential" to the contract, equity will set the contract aside, the important remedial difference consisting in the power in equity to attach terms to the rescission where justice so requires.[26] Thirdly, it contains Lord Westbury's much-cited, legal statement of undefined generality: "It is said, '*ignorantia juris haud excusat*' . . . But where the word '*jus*' is used in the sense of denoting a private right, the maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." [27]

[18] Williston, *Contracts*, § 1589.

[19] See also n. 48 (vi), *infra*, *Re Angel* v. *Jay*.

[20] *E.g.*, Pollock, *Contracts*, 13th ed., 375–6; Chitty, *Contracts*, 20th ed., 235, 460; Halsbury, *Laws of England*, 2nd ed., XXIII, 17, 131, Leake, *Contracts*, 8th ed., 237.

[21] (1730) Mos. 364.

[22] (1748) 1 Ves.Sen. 126.

[23] (1858) 3 De G. & J. 501.

[24] (1865) 1 Ch.App. 62.

[25] *Cf. Bell* v. *Lever Bros.* [1932] A.C. 218 (Lord Atkin) and *Norwich Union Fire Insurance Soc.* v. *Price* [1934] A.C. 462–3 (Privy Council). And no distinction between common law and equity is taken in this respect by the leading text-books.

[26] Expressed in *Cochrane* v. *Willis*, *supra*, 62, 63; *Beauchamp* v. *Winn* (1873) L.R. 6 H.L. 233; *Bettyes* v. *Maynard* (1882) 46 L.T. 769; *Huddersfield Banking Co.* v. *Lister* [1895] 2 Ch. 277, 281–2, 283, 285; *Scott* v. *Coulson* [1903] 2 Ch. 252, 253; *Munro* v. *Meyer* [1930] 2 K.B., 334; *Norwich Union Fire Insurance Society* v. *Price*, *supra*, 462–3; *Solle* v. *Butcher*, *supra*, 693. Illustrated, *e.g.*, in *Bingham* v. *Bingham*, *supra*, *Cooper* v. *Phibbs*, *supra*; *Daniell* v. *Sinclair* (1881) 50 L.J.(P.C.) 50; *Bettyes* v. *Maynard*, *supra*; *Huddersfield Banking Co.* v. *Lister*, *supra*; *Hickman* v. *Berens* [1895] 2 Ch. 638; *Scott* v. *Coulson*, *supra*; *Solle* v. *Butcher*, *supra*.

[27] *Supra*, 170.

Solle v. *Butcher* is relevant to the meaning and scope of Lord Westbury's statement in two respects. To begin with, although Lord Cranworth observed that there was a misrepresentation in *Cooper* v. *Phibbs* [28] nothing in Lord Westbury's judgment suggests that the learned and noble Lord's " private right principle " was intended to cover misrepresentation as well as mistake cases. In *West London Commercial Bank* v. *Kitson* [29] and *Mackenzie* v. *Royal Bank of Canada*,[30] it is true, misrepresentations of a private right were held to be misrepresentations of " fact," but in neither case was *Cooper* cited. In the former, the *ratio* was plain and had nothing to do with the Westbury principle,[31] whilst, in the latter, in the absence of reasoning and citation, the Privy Council may have had in mind Jessel M.R.'s classical definition of misrepresentation of law in *Eaglesfield* v. *Londonderry* [32] or the *ratio* in *Kitson's Case* and not the Westbury principle when it said: " It does not seem to admit of doubt that such a representation made as to the plaintiff's private rights and depending upon transactions in bankruptcy, of the full nature of which she had not been informed, was a representation of fact." [33] In *Solle*, however, Denning L.J. appears, from the context, not to have differentiated between mistake and misrepresentation when he remarked : " . . . the plaintiff . . . was making an ambiguous statement as to private rights; and a misrepresentation as to private rights is equivalent to a misrepresentation of fact for this purpose : *Mackenzie* v. *Royal Bank of Canada*."[34]

Secondly, *Solle* is here important in that it affirms the finding clearly inferable, so far as previous mistake cases are concerned, only [35] in the Privy Council decision of *Daniell* v. *Sinclair*,[36] to the effect that the conception of " private right " in the Westbury principle extends beyond the private right of ownership or title.[37]

[28] *Ibid.*, 164.
[29] (1884) 13 Q.B.D. 360.
[30] [1934] A.C. 468.
[31] *Supra*, 362, 363.
[32] (1875) 4 Ch.D., 702–3.
[33] *Supra*, 476.
[34] *Supra*, 695, read together with the preceding paragraph at 694–5.
[35] *Cf. Lansdowne* v. *Lansdowne*, *supra*; *Bingham* v. *Bingham*, *supra*; *Hitchcock* v. *Giddings* (1817) Dan. 1, *Broughton* v. *Hutt*, *supra*; *Cochrane* v. *Willis*, *supra*; *Cooper* v. *Phibbs*, *supra*; *Jones* v. *Clifford* (1876) 3 Ch.D. 779; *Hart* v. *Swaine* (1877) 7 Ch.D. 42; *Allcard* v. *Walker* [1896] 2 Ch. 369. But see counsel's argument in *Munro* v. *Meyer*, *supra*, 317.

Whether *Re Roberts* [1905] 1 Ch. 707, was decided on the footing of the Westbury principle is not clear from the report. With quasi-contractual cases, the position has been for long well-established; see *Anglo-Scottish Beet Sugar Corporation* v. *Spalding U.D.C.* [1937] 3 All E.R. 335, and cases cited there at 339–40.
[36] (1881) 50 L.J.P.C. 50.
[37] The *obiter dictum* of Wright J. in *Munro* v. *Meyer*, *supra*, 334, to the effect that the Westbury principle is confined to private rights of ownership must now be regarded as overridden. Similarly, one should disregard the fact that the Westbury principle was *not* evoked in *Bell* v. *Lever Bros.*, *supra*, or *British Homophone Co.* v. *Kunz* (1935) 152 L.T. 589. (Though it might have altered the decision in the latter, in the former it is difficult to see how, on

The limits of the extension, however, remain uncertain and to be determined in future litigation. For the time being, *Solle* continues that process which was begun in *Daniell's Case*, and (assuming the Westbury principle to apply to cases of misrepresentation) in at least *Mackenzie's Case*, and which is not uncommon in English law, of defining a highly general principle not in so many words but by the accumulation of specific instances. It may be added that, jurisprudentially, the widening of the circle of meaning of the Westbury principle is a sympathetic process since its larger consequence is to diminish the importance of distinguishing between "law" and "fact" in civil cases.

Granted, then, that the mistake in *Solle* referred to a "fact" or "facts," on what ground were they "fundamental"? As Denning L.J. put it: "A contract is . . . liable in equity to be set aside if the parties were under a common misapprehension either as to facts or [38] as to their relative and respective rights, provided that the misapprehension was fundamental." [39] As mentioned above,[40] the rule of equity is here identical, apart from the scope and flexibility of remedy, with that at common law, and, although no court has expressly stated it, I think it is by way of legitimate analogy to assert that in this equitable rule, "fundamental fact" has the same meaning as in the common law rule,[41] which has five specific categories of "fundamental fact" together with a residuary category.[42]

the reasoning of the majority, its invocation could have changed the decision.) As authority *sub silentio* (if at all), they are too weak to stand against the express judgment at least of *Solle* v. *Butcher*. The limits set so far in this respect to the Westbury principle are contained in (i) the general statement of Lord Atkin in *Bell* v. *Lever Bros.*, *supra*, at 218, that "Applied to mistake as to rights generally it would appear to be too wide"; (ii) the rule in *Wilde* v. *Gibson* (1848) H.L.C. 605, 632, 633 (*cf. Allen* v. *Richardson* (1879) 13 Ch.D. 542–3) and (iii) s. 12 Sale of Goods Act, 1893.

[38] Strictly, the disjunctive preposition is here misleading. "Facts" in the context above *include* the parties' "relative and respective rights."

[39] *Supra*, at 693.

[40] *Supra*, n. 26.

[41] One might say that here, "Equity follows the Law," provided one bears in mind Hohfeld's caution that the maxim is a "mere 'guidepost' and must not be taken literally": *Fundamental Legal Conceptions*, 128.

[42] For the specific heads see, *e.g.*, (1950) 13 M.L.R. 63, or Benjamin, *Sale*, 7th ed., 105. The residuary category may be described, in the words of Lord Wright in *Norwich Union Fire Insurance Society*, *supra*, 463, as being, in an objective sense, "the underlying assumption of the contract or transaction," or, in the words of Greene L.J. in *Craven-Ellis* v. *Canons, Ltd.* [1936] 2 K.B. 413, as being, in an objective sense, "a fact" essential to the making of the agreement and [forming] the basis upon which the parties purported to contract." I have modified the view I expressed in 13 M.L.R., *supra*, in deference partly to the fact that that view appears unsupported by judicial utterance, which adheres rather to the wider view of Lord Wright and Greene L.J. and partly to the case of *Craven-Ellis* itself where, as a secondary ground of decision the contract there in issue was held void for a bilateral mistake referring to an attribute of a party which was vital because its existence "formed the basis upon which the parties purported to contract" and not—*semble*—because it affected identity: *supra*, 413, see also (1939) 55 L.Q.R. 55. As in the case of other residuary categories, like that in charitable trusts, the danger inhering in this residuary head of "fundamental fact" is that it

That the misunderstanding of the effect of the structural alterations was not a mistake as to the identity proper of the subject-matter is, I think, plain. Thus, Denning L.J.: "The parties agreed in the same terms on the same subject-matter." [43] And Jenkins L.J.: "The defendant meant to grant and the plaintiff meant to take a lease in the terms in which the lease was actually granted of the premises which the lease as granted actually comprised." [44] The mistake regarding the change of identity can be classified as one referring to a vital quality or attribute of the subject-matter (within the rule in *Bell* v. *Lever Bros.*[45]), in that a dwelling-house freed from its old standard rent is, for practical purposes, substantially different from one still tied. It is in this sense, I would submit, that Bucknill L.J.'s first ground of decision should be read. The mistake looked at as referring to the lessor's private right might be classified in the same way, or, alternatively, in the residuary category of "fundamental fact" as being, from an objective viewpoint, a "private right affecting the basis of the contract entered into," [46] or "the underlying assumption of the contract or transaction." [47]

So much for the preliminaries regarding *Solle*, its immediate effect in law and its place in the long list of mistake cases. I now want to turn to what I consider to be its wider implications; for the judgment of Denning L.J. contains, in my opinion, by far the most important and comprehensive attempt to reinterpret the law of contractual mistake since Lord Atkin's judgment in *Bell* v. *Lever Bros.* The nuclear passage runs: "All previous decisions on this subject must now be read in the light of *Bell* v. *Lever Bros., Ltd.* [1932] A.C., at pp. 222, 224, 225–27 and 236. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely upon his own mistake, to say it was a nullity from the beginning, no

might become over-extended. An objective interpretation of the head mitigates the danger, which would be entirely obviated if the courts always disposed of an equitable discretion; and this would be so were common law displaced in contractual mistake by equity, as is later urged in the text above.

[43] *Supra*, at 692.

[44] *Ibid.*, 705.

[45] The actual finding of fact in *Bell* v. *Lever Bros.* and *Leaf* v. *International Galleries* [1950] 2 K.B. 86 tends to militate against this, without, of course, being decisive. But *cf. Nicholson & Venn* v. *Smith-Marriott* (1947) 177 L.T. 189. On the other hand, as the "fact" in *Solle* was held to be "fundamental" in the equity sense, it was also so in the common law sense, as there is, in my submission, no distinction between the meanings of the conception in the two systems.

[46] Jenkins L.J., *Solle, supra*, 705.

[47] Lord Wright, nn. 26, 42, *supra*.

matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. *A fortiori*, if the other party did not know of the mistake, but shared it. The cases where goods have perished at the time of sale, or belong to the buyer, are really contracts which are not void for mistake but are void by reason of an implied condition precedent, because the contract proceeded on the basic assumption that it was possible of performance." [48]

[48] *Supra*, at 691. This is a convenient juncture at which to footnote some comments on six asides of Denning L.J. regarding mistake and misrepresentation:

(i) In respect of what courts of equity considered to be unconscientious, Denning L.J. said "equity has shown a progressive development. It is now clear that a contract will be set aside if one party, knowing that the other is mistaken about the terms of an offer or the identity of the person by whom it is made, lets him remain under his delusions and concludes a contract on the mistaken terms instead of pointing out the mistake" (692). No authority was cited for this proposition, perhaps because none exists. The precise attitude of equity today is described in Story's *Equity Jurisprudence*, 3rd Eng. ed., 65–6. That Denning L.J.'s proposition would form a desirable rule of law is not to be questioned, at least in so far as it would enhance one of the most important features of commercial law, which is the improvement of commercial morality and the increase of good faith in commercial dealings, and would reverse the decision in *Smith* v. *Hughes*, as the learned Lord Justice later pointed out (693). For existing law to reach the position described, however, I think equity would have to make greater progress in its development than hitherto.

(ii) On the basis of the same proposition, "according to the view by Blackburn J., of the facts, the contract in *Lindsay* v. *Cundy* was voidable and not void" (693), a method of disposing of a House of Lords decision by a judge of a lower court which must be one of the most breathtaking on modern record.

(iii) On the basis of the same proposition, again, "the lease in *Sowler* v *Potter* was . . . voidable and not void" (693). The conclusion one would agree with, though, as already indicated, the reasoning is extremely debatable.

Earlier, Denning L.J. mentioned the sounder reason when he remarked: "I do not think that *Sowler* v. *Potter* can stand with *King's Norton Metal Co., Ltd.* v. *Edridge*, which shows that the doctrine of French law as enunciated by Pothier is no part of English law" (691–2).

(iv) "Nor do I think that the contract in *Nicholson & Venn* v. *Smith-Marriott* was void from the beginning" (692). The sole comment possible here is that the learned judge advanced no reason whatever for the statement cited.

(v) "*Bell* v. *Lever Bros., Ltd.*, . . . was treated in the House of Lords as a case at law depending on whether the contract was a nullity or not. If it had been considered on equitable grounds, the result might have been different" (694). *Bell* v. *Lever Bros.* involved a bilateral mistake; in equity, a contract will be set aside for such mistake provided the mistake refers to a "fundamental fact." In *Bell*, by majority judgment, the "fact" was not "fundamental" whether regarded as attribute of subject-matter or as "private right." Consequently, on the law as it is, the result in equity would have been the same as at common law. See also nn. 26 and 45, *supra*.

(vi) "No distinction can be taken between rescission for innocent misrepresentation and rescission for common misapprehension . . . *Cooper* v. *Phibbs* shows that rescission is available even after an agreement of tenancy has been executed and partly performed . . . If and in so far as *Angel* v. *Jay* decided that an executed lease could not be rescinded for an innocent misrepresentation, it was in my opinion a wrong decision" (695-6). The discrepancy between the rule in *Cooper* and the decision in *Seddon's Case* is a valid one to draw. But, the rule in *Cooper* pre-requires a "fact" that is "fundamental." Consequently, the decision in *Angel* v. *Jay*, where the "fact" involved appears to have been of "collateral" importance, cannot be influenced by juxtaposing *Cooper*. Denning L.J.'s choice of wording in *Solle* does not clash with this conclusion.

One is confronted with two problems: how far, in the first place, Denning L.J.'s restatement of the law of mistake is an organic development from the passages cited in *Bell* v. *Lever Bros.*, and, in the second place, the validity of the learned Lord Justice's restatement itself.

Briefly, *Bell* v. *Lever Bros.* was concerned with a problem of "fundamental fact" and the elucidation of the meaning of a vital quality of the subject-matter was the main contribution of Lord Atkin to mistake jurisprudence. Lord Atkin did, *obiter*, gather up and attempt to reinterpret the rules of contractual mistake, but the attempt, though of great value, remained incomplete in the judgment and did not, in my respectful submission, have the deep-reaching implications for the law of mistake which Denning L.J. claimed. Looking shortly at the passages on which the learned Lord Justice relied, p. 222 gives Lord Atkin's construction of decisions like *Smith* v. *Hughes*.[49] That construction I have already commented upon and criticised recently and to those comments and criticism I have here nothing to add.[50] P. 224 consists of no more than an emphatic underlining of the irrelevancies of uncommunicated beliefs in the law of contract: or, put another way, p. 224 reiterates one of the cardinal policies of the law of contract in giving special legal force to objective appearances. Lord Atkin's judgment at pp. 225–7 may be condensed into two propositions. First, conditions are not to be lightly implied into contracts, especially as an "alternative mode of expressing the result of a mutual mistake" (at 224) and, second, the type of fact to which a contractual term must refer before it can be a condition is one where "the new set of facts makes a contract something different in kind from the contract in the original set of facts" (at 226). This, continued Lord Atkin, was the same as the definition of "fundamental fact" in cases of mutual mistake [51] and it was on the application of this test that Lord Atkin ultimately rested his decision. Lord Thankerton, at p. 236, did no more than discuss the nature of "fundamental fact" in contractual mistake. In the judgments of neither Lord Atkin nor Lord Thankerton is there to be found that severe curtailment of the function of the common law of contractual mistake which is the primary feature of Denning L.J.'s restatement.

[49] (1871) L.R. 6 Q.B. 597.

[50] 13 M.L.R. 50.

[51] [1932] A.C. at 226–7. Denning L.J. is to the contrary in *Leaf's Case*, *supra*, at 94. How this clash is to be resolved, how the "fundamental fact" of the common law and, in my submission, equity rules of mistake is to be related to the "substantial and fundamental matter" of the condition (*Benzten* v. *Taylor* [1893] 2 Q.B. 281) save on the footing of equivalence is a problem that must be left to the future. Take a situation like that in *Leaf*. If a condition—"fact" is "fundamental" in the contractual mistake sense, then an innocent misrepresentation which amounts also to a (broken) condition involves automatically a bilateral mistake regarding a fundamental fact and the contract is void *ab initio* at common law or voidable *ab initio* in equity. *Quaere*, the effect of Sale of Goods Act, 1893, ss. 11 (1) (c) and 61 (2) where contract already executed?

If the above analysis be a true one, it is respectfully submitted that Denning L.J.'s restatement constitutes a novel departure point in the development of the law of contractual mistake, the value of which now falls to be considered.

As already foreshadowed, the originality and gravamen of the restatement consists in the attempt made to redraw on the territory of contractual mistake the boundary line between common law, on the one side, and equity, fraud and breach of condition, or, substantially, equity, on the other. It is a line which, the state of equity and common law in contractual mistake requires, must touch two points. First, it is necessary to consider the fundamental relationship between common law and equity in this legal sector; thus why was common law applied in *Cundy* v. *Lindsay* [52] to the exclusion of equity, and why in *Solle* was the lessor limited to his equitable rights and not given the great advantage of his rights at common law? Secondly, if the definition of the fundamental relationship accords a place to both common law and equity in contractual mistake, it is necessary to consider how this territory is divided between the two legal blocs, whether their respective areas are more or less equal or whether the one predominates over the other.

The fundamental relationship question received at Denning L.J.'s hands two separate answers that are open to strong criticism. First, certain words employed by the learned Lord Justice suggest that, before 1875, courts of equity would take it for granted that the common law did not apply to the particular case in hand—*semble*—by the fact that the plaintiff had seen fit to bring his case in equity. Thus: "whilst *presupposing* that a contract was good at law or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake so long as it could do so without injustice to third parties." [53] For a policy of this kind in the equity courts there is virtually not a scintilla of authority.[54] Equity courts did not, it is true, trouble themselves about whether or no the contract before them was void at common law but this apparent indifference was a very different attitude from the positive policy of presupposition indicated in the above passage.

Other words used by Denning L.J. suggest another conception, namely, that before applying equitable rules to any contractual mistake, courts of equity would assure themselves, to begin with, that the mistake had not rendered the contract void at common law. Thus, in referring to the type of mistake made in *Cooper* v. *Phibbs*, Denning L.J. said: "The mistake there as to the title to the fishery did not render the tenancy agreement a nullity. If it had the contract would have been void at law from the beginning

[52] (1878) 3 A.C. 459.
[53] *Supra*, 692. Italics added.
[54] *Cf. Scott* v. *Coulson*, *supra*, 252 and text to n. 44, *infra*; also, Smith, *Leading Cases*, 13th ed., Vol. 2, at p. 100.

and equity would have had to follow the law. There would have been no contract to set aside and no terms to impose. The House of Lords, however, held that the mistake was *only* such as to make it voidable, or, in Lord Westbury's words 'liable to be set aside' on such terms as the court thought fit to impose; and it was so set aside."[55] In fact, there is no trace in any of the mistake cases that the courts of equity ever gratuitously decided that a contract was not void for mistake at common law before applying equity. Whether before or since 1875 the application of common law or equity to mistake situations has been determined, formerly, by which court the action was brought in, and, latterly, with the possible exception of *Solle* v. *Butcher*,[56] by the nature of the parties' arguments, and the one or the other appears to have been invoked by the parties according to the convenience of the case. Furthermore, it is simply inaccurate to say that the House of Lords in *Cooper* v. *Phibbs* held that the contract was "only" voidable: the plaintiff in that case asserted that the contract was voidable in equity and the court held it to be so without the significant modification which Denning L.J. imported.

Denning L.J.'s reading, then, of the fundamental common law-equity relationship in contractual mistake leaves a place for both systems of case law. The more substantial part of the learned Lord Justice's restatement is directed to drawing, or rather, revising, the area of contractual mistake covered respectively by each. A beginning may be made by citing the following passage: "Since the fusion of law and equity . . . it will be found that only those contracts are now held void in which the mistake was such as to prevent the formation of any contract at all."[57] These words, it is plain, beg the question as to when the formation of a contract is prevented by a mistake. In elaborating this thought, Denning L.J. went on with the nuclear passage already cited, part of which may conveniently be repeated now": . . . once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends or for fraud, or on some equitable ground."[58] It would follow from this passage, (a) that if the parties have "to all outward appearances" made a contract, the contract cannot be a nullity but may be voidable for one of the reasons given; and, (b) that the common law can operate to vitiate a contract only where there are no

[55] *Supra*, 694.
[56] The *non est factum* cases discussed later also include exceptions, at least since *Hunter* v. *Walters* (1871) 7 Ch.App. 75, but only apparent exceptions, for there the equity and common law rules are identical, and—*semble*—firmly welded together.
[57] *Supra*, 691.
[58] *Ibid.*

" outward appearances " of a contract. I would respectfully submit that the initial flaw in this restatement is constituted by the fact that the precise nature of a contract made " to all outward appearances " is left undefined.

From the decided cases it would seem that there are two, perhaps three, classes of contract which might fit Denning L.J.'s " agreement-to-all-outward-appearances " formula. First, contracts where the parties have been both actually and apparently *ad idem* are clearly contracts where the parties have " to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter." Such mistake contracts have, however, in many cases up to the House of Lords been held to be void for mistake at common law: *e.g.*, *Cox* v. *Prentice*,[59] *Couturier* v. *Hastie*,[60] *Scott* v. *Coulson*.

Similarly, the class of contract in which the parties were not actually *ad idem* but were apparently so because of the mode in which their bargain was expressed might be considered to fall within the terms and meaning of the formula; but, here too, although for reasons discussed elsewhere, the contract in *Smith* v. *Hughes* was held valid, there are many cases of mistake contracts of this kind being held void at common law, like *Raffles* v. *Wichelhaus*,[61] *Scriven* v. *Hindley* [62] and *Hartog* v. *Colin and Shields*.[63] If these are the cases intended by Denning L.J., it is manifest that the learned Lord Justice's formulation fails entirely to harmonise with long-established precedent; and the same observation would hold true if contracts induced by fraud were regarded as contracts where the parties have " to all outward appearances agreed, etc. . . .", and so never void at common law. But, surely, there is an outward appearance of disagreement within the sense of the formula where A induces B to conclude a contract by a fraudulent [64] misrepresentation. If this be so, the common law of mistake would be confined to fraud cases, but then the formula would suffer from a severe internal contradiction, not to mention the additional antagonism to the formula in this respect of well-established decisions.[65]

[59] (1815) 3 M. & S. 344.

[60] (1856) 5 H.L.C. 673. But see the recent Australian case of *McRae* v. *Commonwealth Disposals Commission*, 25 A.L.J. 425, noted in 15 M.L.R. 229, which points up sharply the need for a remedy in tort in Australia as much as in England for loss caused by negligent misstatements as well as suggesting another possible mode of simplifying contractual mistake, *viz.*, by its gradual disintegration into offer and acceptance, implied condition precedent, etc.

[61] (1864) 2 H. &. C. 906.

[62] [1913] 3 K.B. 564.

[63] [1939] 3 All E.R. 566.

[64] *Quaere*: and innocent misrepresentation too?

[65] With Denning L.J.'s formula should be constrasted the views regarding *ad idem* and no-*ad idem of* Lindley L.J. in *Hickman* v. *Berens* [1895] 2 Ch. 647, and *Wilding* v. *Sanderson* [1897] 2 Ch. 550; and of Lord Wright in *Munro* v. *Meyer*, *supra*, 333, and *Norwich Union Fire Insurance Society*, *supra*, 463.

Finally, it may be demonstrated that Denning L.J.'s treatment of the substantive division of contractual mistake between common law and equity is inconsistent with his definition of the fundamental common law-equity relationship. For the three categories of contract, namely, where the parties are (i) actually and apparently *ad idem*, (ii) not actually but apparently *ad idem*, and (iii) neither actually nor apparently *ad idem*, cover the whole range of common law mistake cases. Thus, if it be conceded that the "agreement-to-all-outward-appearances" formula covers all three categories, the irresistible conclusion is that there is no place at all for the common law rules relating to contractual mistake, which is tantamount to saying that the common law rules have been displaced partly by the law of implied conditions but mainly by the rules of equity. Even if it be said that the formula excludes fraud cases—a difficult contention since fraud cases appear expressly included—the same conclusion would result, though *pro tanto*. Leaving aside the implied condition doctrine upon which I have commented elsewhere,[66] the possible displacement of common law by equity would depend, technically, on the applicability of the principle in section 44 of the Judicature Act, 1925, that, within the sphere of contractual mistake, common law and equity are "in conflict or variance." But, in defining the fundamental relationship between equity and common law, Denning L.J. was at pains to say that, in effect, equity had in the contractual mistake cases come to fill out the law and not to replace it, a reservation which breaks the cohesion of the total restatement and brings a search for its final meaning up against a blank wall.

But although, as I respectfully submit, the restatement is because of its internal conflicts and conflict with authority unacceptable, the problem of the common law-equity relationship in the contractual mistake field to which it was directed is a real and puzzling one. I would respectfully suggest that the principal reason why the restatement is so dissatisfying lies in the fact that the inquiry into the common law-equity relationship was not pushed far enough: a comparison of the respective scope and coverage of the equity and common law rules was not fully made, the requirements of justice in "third party cases" were not adequately met, and the perplexing fact that given certain situations equity and common law will respectively produce different practical as well as technical results was only partially faced. The remainder of this study is occupied with the exploration of these lines of thought, concluding with an examination of the question whether a "conflict or variance" may be said to exist in this legal sector.

[66] 13 M.L.R. (1950) 63, n. 52.

Equity for Common Law

The first subject for investigation, then, is whether the coverage of the equitable rules and principles governing contractual mistake is at least commensurate with that of the rules and principles at common law.

The pattern of common law rules with which I wish to compare those of equity is the pattern I delineated recently [67]: that, provided the mistake refers to a "fundamental fact," common law gives effect to the mistake and treats the contract as void where the mistake is bilateral [68] or where a unilateral mistake has not been due to the misjudgment or fault of the mistaken party but to some other circumstance by which it was reasonable in a commercial sense that he should have been induced to enter into the contract, *viz.*, at present, (i) the fraudulent misrepresentation of the other party, or (ii) a third party's act or some fact or occurrence apart from a person's conduct, or (iii) a pure accident giving rise to an error in the terms of the offer known to the offeree.

With regard to the case of bilateral mistake, it has already been mentioned that the equity rule is, apart from remedy, identical with that at common law [69] and might therefore readily displace the latter. But, as already indicated, such displacement would not relieve the courts of the present task of defining a "fundamental fact." Owing to the bias of past litigation, while the definition of "fundamental fact" has, at common law, been tightly stuffed with meaning, it has in equity received only a meagre content. Accordingly, in fusing the two systems this corpus of common law learning would properly have to be taken over into equity. The equitable rules relating to bilateral mistake do, of course, stretch beyond the ambit of those at common law, in that an innocent misrepresentation will render a contract voidable even though it refers to a "collateral" fact,[70] and, in certain classes of cases, a contract will in equity be set aside where the bilateral mistake refers to a matter of law. But these extended applications serve only to emphasise the facility with which the substitution might be made.

Turning to the unilateral mistake heading (i) above, it needs simply to be mentioned first that equity (like common law) sets aside contracts where the fraudulent misrepresentation refers only to a "collateral" as well as a "fundamental" fact. Much more, however, needs to be said about the *non est factum* cases, or the

[67] *Ibid.* 59–62.

[68] Including, of course, cases of innocent misrepresentation.

[69] *Supra*, nn. 26 and 40, and text thereto.

[70] Some controversy regarding this point still lingers: see Benjamin, *Sale*, 5th ed., 495, and books referred to therein at n. (*m*); also Benjamin, 6th ed., 455 and n. (*m*) there. The modern works favour the view in the text above: Pollock: *op. cit.*, 459–60 Chitty: *op. cit.*, 539–46 *sub silentio*; Cheshire & Fifoot, *Contracts*, 2nd ed., 198; Anson, *Contracts*, 19th ed., 174–5; Leake: *op. cit.*, 258–9; Halsbury, *op. cit.*, 52–3; Ashburner, *Equity*, 2nd ed., 279; and, by strong implication, *Gilchester Properties, Ltd.* v. *Gomm* [1948] 1 All E.R. 493. *Cf.* also, *Redgrave* v. *Hurd* (1881) 20 Ch.D. 12–13.

cases involving a unilateral mistake that relates to the nature of the entire transaction. These, it is true, are not of necessity fraud cases,[71] but, as the litigation has been concerned exclusively with fraudulently induced mistakes, they may conveniently be discussed at this point. Many of these cases involve situations in which the fraudulent misrepresentee has been induced to enter, through his signature, into contractual relations with an innocent third party either originally or ultimately.[72] It is, therefore, of the essence of these cases that to escape liability the misrepresentee must be able to show the contract to be void *ab initio* and not merely voidable. Hence, at first thought, it would seem as though the *non est factum* rule were peculiar to common law. To the contrary, however, a reading of the cases shows that where a signature is obtained in the stock way, the resultant agreement is in equity as well as at common law void *ab initio*. The equitable rule has paralleled the common law; indeed, since *Hunter* v. *Walters*,[73] it may be said that the equitable and common law rules have become inextricably intertwined both in regard to the *non est factum* rule and the negotiable instruments exception to that rule.[74] But in whatever manner the matter may be regarded, it is plain that the unilateral mistake heading (i) has its well-established equitable counterpart.

So too, is heading (iii) covered by the rules of equity: *Hartog* v. *Colin and Shields*[75] is matched by *Webster* v. *Cecil*.[75] Whether in equity a unilateral mistake of this sort must refer to a fact that is "fundamental" for the purposes of rescission, has not been litigated, and remains, therefore, uncertain.

Heading (ii) gives rise to more obstinate difficulties: "... the general authority of a court of equity is to relieve against any cases of fraud, trust, accident or mistake,"[76] but, however strong equity's capacity to develop may have been in the seventeenth and eighteenth centuries, it has long since become clear that its dynamic has been reduced to the steady, sober pace set by the doctrine of precedent. Whether because of a desire for a greater appearance of certainty, or because of judicial caution in the face of the increasing mass and complexity of case law, or, as recently urged, because of the inhibitive

71 *Cf.* the matrimonial cases of *Newman* v. *Newman* (1926) *Times*, October 15, and *Kelly* v. *Kelly* (1932) 49 T.L.R. 99.

72 *Originally*: *Thoroughgood's Case* (1581–82) 2 Co.Rep. 9b; *Lee* v. *Angas* (1866) 7 Ch.App. 79 n. (3); *Ogilvie* v. *Jeafferson* (1859) 2 Giff. 353; *King* v. *Smith* [1900] 2 Ch. 425; *Howatson* v. *Webb* [1907] 1 Ch. 537, [1908] Ch. 1; *Carlisle & Cumberland Banking Co.* v. *Bragg* [1911] 1 K.B. 489.

Ultimately: *Vorley* v. *Cooke* (1857) 1 Giff. 230; *Foster* v. *Mackinnon* (1869) L.R. 4 C.P. 704; *Hunter* v. *Walters*, *supra*; *National Provincial Bank* v. *Jackson* (1886) 33 Ch.D. 1; *Lloyds Bank* v. *Bullock* [1896] 2 Ch. 192; *Lewis* v. *Clay* (1897) 67 L.J.Q.B. 224.

73 *Supra.*

74 See arguments and judgment in *Hunter* v. *Walters*, *ibid.*; *National Provincial Bank* v. *Jackson*, *supra*; *Howatson* v. *Webb*, *supra*; *Carlisle*, *etc.* v. *Bragg*, *supra*; *Blay* v. *Pollard* [1930] 1 K.B. 628.

75 [1939] 3 All E.R. 566; (1861) 30 Beav. 62. See 13 M.L.R. 61–62.

76 *Cf. Irnham* v. *Child* (1781) 1 Bro.C.C. 93. And works, like *Story on Equity*, generally.

effect of section 25 (11) of the Judicature Act, 1873,[77] the course of equitable development now runs within the "course of the decisions."[78] A situation like that in *Scriven* v. *Hindley* is not quite covered by any specific discrete rule of equity, nor does any equity case constitute a clear precedent-analogy. The auctioneer's catalogue in *Scriven* did not exactly amount to an innocent misrepresentation. The bargain was not an "unconscionable" one in the sense of equity cases like *Wood* v. *Abrey*,[79] *Clark* v. *Malpas*,[80] or *Fry* v. *Lane*[81]; it did not involve a "surprise" as defined by the cases in equity of *Evans* v. *Llewellin*,[82] *Bath and Montague's Case*,[83] or *Willans* v. *Willans*.[84] On the other hand, the purchaser in *Scriven* did not reasonably lack diligence and so could not be said to be estoppable in accordance with equitable cases like *Calverley* v. *Williams*,[85] *Wason* v. *Wareing*,[86] or *Tamplin* v. *James*.[87] Perhaps the nearest precedent would be that of *Torrance* v. *Bolton*,[88] where the short facts were that a property was authorised to be auctioned as an "immediate absolute reversion." No conditions of sale were printed or circulated among the prospective bidders but provisions of sale were simply read out in the auction-room just before the sale commenced revealing the property to be subject to three mortgages. The purchaser, who was deaf, bid for the property as unincumbered and consequently purchased it at an excessive price. After the contract was concluded but before completion he sought rescission. The court held that in relying on the terms of the advertisement and in making no further inquiries the purchaser acted like a "prudent man,"[89] and the court affirmed the decree of rescission previously granted by the Vice-Chancellor. James and Mellish L.JJ., commenting on the description in the advertisement, said that it "was calculated, if not intended, to entrap or mislead persons who would thereby be entrapped into the auction-room."[90] Nevertheless, the court did not go so far as to call the advertisement a fraud *stricto sensu*, but affirmed the V.-C.'s decree on the ground that the indirect deception effected made it unconscionable for the vendor to avail himself of the legal advantage he had obtained. The moral obliquity of the vendor in *Torrance*, however, was clearly greater than in *Scriven*. Similarly, again, in the equity case of

[77] Dr. O. R. Marshall: "Anachronisms in Equity," 1950 *Current Legal Problems*, 33 *et seq.*
[78] W. H. D. Winder: "Precedent in Equity," 57 L.Q.R. (1941), 247 *et seq.*
[79] (1818) 3 Madd. 417.
[80] (1862) 4 De G.F. & J. 401.
[81] (1888) 40 Ch.D. 312.
[82] (1787) 2 Bro.C.C. 150; 1 Cox 339.
[83] (1693) 3 Cas. in Ch. 55.
[84] (1809–10) 16 Ves. 72.
[85] (1790) 1 Ves.Jun. 210.
[86] (1852) 15 Beav. 151.
[87] (1880) 15 Ch.D. 215.
[88] (1872) L.R. 8 Ch.App. 118.
[89] *Ibid.*, 123.
[90] *Ibid.*

M'Carthy v. *Decaix* [91] the defendant was guilty of moral fault, short of fraud *stricto sensu*, but greater than in *Scriven*. On the other hand, no equity court has ever yet had occasion to refuse relief in a situation of the *Scriven* type.

The common law remedy for a situation like that in *Thornton* v. *Kempster* [92] is not as difficult to translate into equity as that in *Scriven*, the nearest equitable analogy being *Lansdowne* v. *Lansdowne*. In the latter case, it is true, the mistake was bilateral and one of law, but, here, it is submitted, neither distinction would be material, the overriding similarity being the mistake induced by the act of a third party which threatened the misled party with an unjust hardship.

Whether the general equitable principle stated in *Irnham* v. *Child* [93] might be given an additional application to a *Scriven* situation would depend partly on the existing dynamic in the body of equity, and partly on the creative inclination of the judges administering equity, that is, on their inclination to take advantage of the malleability of the concept in law. As already mentioned, the course of the decisions and doctrine of precedent dictate at the moment the speed at which equity may develop, but there is nothing in legal history to show that a "mechanical" [94] period in the growth of a particular segment of the law is, once it sets in, eternal. If legal history has anything to teach, it is that the legal world is an expanding universe. It is only the rate of expansion that has varied from period to period, from the sluggish movement of the feudal age to the great acceleration that has occurred in modern times. The instruments, again, of reform and development employed by judges have varied with the diverse impulses of the judges, one of whom at least today has shown himself ready to employ a quickened equity to further the ends of individual justice.[95]

If so sweeping a move were made as the replacement of the common law of contractual mistake by equity, it would probably be found that the slightly difficult position of *Scriven* v. *Hindley* is not irreducible.

On the whole, then, equity does cover the entire common law ground in contractual mistake, so that it is technically feasible to substitute the one for the other without sacrifice of remedy in any particular case and to the greater simplification of the law. It may be added that this result is possible because in relation to the legal problems of defining a "fundamental fact" and deciding, on grounds of convenience and fairness, whether effect should be given

[91] (1831) 2 Russ. & M. 614.
[92] (1814) 5 Taunt. 786.
[93] *Supra*, n. 76.
[94] Hanbury: *Essays in Equity*, 23.
[95] I refer to Denning L.J.: see, *e.g.*, *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] 1 K.B. 130; *Combe* v. *Combe* [1950] 2 All E.R. 1115.

to a bilateral or unilateral mistake, the approach of both equity and common law has been basically the same. Whether the substitution is one that is practically desirable must now be considered.

The Practical Consequences

The significant legal differences between common law and equity in contractual mistake are that, on the one hand, a contract is void *ab initio*, on the other, voidable,[96] that, on the one hand, contract-nullity gives rise at common law to total failure of consideration and a simple and rigid reversal of the parties' respective legal positions, whilst, on the other, the process of *restitutio in integrum* is a flexible one, assisted by a sophisticated machinery of adjustment and compensation.

These technical differences, however, produce differences of practical importance in only two classes of cases[97]: where an innocent third party's rights become involved, and where, in cases uncomplicated by the rights of third parties, something more in the

[96] *i.e.*, voidable *ab initio*. The fact that the contract will be rescinded as from the beginning has had, owing to the *restitutio in integrum* rule and the general rules protecting third parties, no practical consequences until *Solle* v. *Butcher*. In the latter, it was because the lease was avoided as from the beginning and not from the commencement of action that no over-payment of rent in the period prior to action occurred and was repayable. There being no lease from the beginning, there existed no agreed or "standard" rent, as between the parties.

[97] In insurance law, whether a misrepresentation, fraudulent or innocent, refers to a "fundamental" fact or not is immaterial; the difference between contract-nullity and contract-voidability, between the rigid remedy and the flexible, developed one is similarly of no importance.

In marine insurance law, innocent or fraudulent misrepresentations vitiate the policy and the premium is returnable as for total failure of consideration unless the fraud was that of the insurer: Arnould, *Marine Insurance*, §§ 537, 1247, 1247a, 1256. Note: *Anderson* v. *Thornton* (1853) 8 Ex. 425, 427–8.

In non-marine, general insurance law, the net result is the same, though with some slight confusion of theoretical basis. In *Duffell* v. *Wilson* (1808) 1 Camp. 401; *London Assurance* v. *Mansell* (1879) 11 Ch.D. 363; *Biggar* v. *Royal Life Assurance* [1902] 1 K.B. 516, and *Joel* v. *Law Union and Crown Insurance* [1908] 2 K.B. 431, the contract of insurance was held "void," in the last case for innocent, in the rest for fraudulent misrepresentation. In all restitution was ordered simply, but, in *Joel*, the feasibility of *restitutio* was regarded as a serious pre-condition to setting aside the contract, though described as "void"; *supra*, at 439–40. In *Kettlewell* v. *Refuge Assurance* [1908] 1 K.B. 545, decided in the C.A. before *Joel* but approved without reservation or qualification by the House of Lords after *Joel* in [1909] A.C. 245, and therefore the latest pronouncement on this point, the court held premiums recoverable by insuree who had been the victim of insurer's agent's fraud. The C.A. divided in its reasoning: Alverstone C.J. apart from thinking the premiums were recoverable at common law as damages in deceit (at 550), principally averred that, though the contract was only "voidable" and the insurer had therefore entered upon risk, one could not speak of "a mere risk of that kind, which has not produced any benefit in fact to the assured as being a part performance" (at 549). President Gorell Barnes thought that the insuree had the right, as the contract was "voidable," "to declare the contract void" (at 551) from, in effect, the very beginning. Buckley L.J. (who dissented) said that, as the contract was only "voidable" the insurer had been "at risk" and had therefore given sufficient consideration to block the return of premiums as money had and received to insuree's use (at 552–3). See also MacGillivray, *Insurance Law*, 3rd ed., 1217–26.

way of compensation and adjustment of rights is demanded by the justice of the case than a simple reversal of the parties' positions.

The Third Party Cases

The relevant cases so far litigated belong exclusively to the province of the law of sale of goods.[98] The difference in such cases between applying common law or equity, the difference that is to say made by the contract being voidable instead of void, is straightforward and decisive. The one body of law involves the unmodified operation of primary rules of title and the third party acquires no ownership: *nemo dat quod non habet*; the other enables the logic of those primary rules to be brushed aside and the third party is protected. The ultimate reason for by-passing the primary rules of title in commercial law is rooted in considerations of public policy, which have so far precipitated at least four heads in this respect: first, the need in appropriate cases to secure uniformity between national bodies of commercial law,[99] and second, the minimising of impediments to the due administration of justice,[1] neither of which are here relevant, third, the current judicial idea of commercial convenience and, fourth, the current judicial notion of fault-liability. So, whether the substitution of equity for common law in fundamental mistake cases is desirable will depend on the dictates of commercial convenience and/or the principle of fault-liability, as currently conceived.[2] From another aspect, the problem may be put as whether or not it is desirable that there should be extended to third party mistake cases the doctrine of the negotiability of chattels that is at present compounded of (i) in relation to the law of bills of lading, section 47 of the Sale of Goods Act, 1893, to which might possibly be added, section 3 of the Bills of Lading Act, 1855, and the conclusive presumptions in favour of an endorsee for value or person rightfully presenting and taking delivery under a bill created by the words, "Shipped in good order and condition,"[3] or, "shipped in apparent good order and condition,"[4] or by a statement in a bill that freight had been paid in advance,[5] (ii) the rule of ostensible authority in agency and partnership law, and (iii) the doctrine of estoppel as exemplified specifically in such cases as *Woodley* v. *Coventry*,[6]

98 Third party cases in the *non est factum* series are not here relevant for reasons already discussed, *supra*.

99 *Cf.* debate on Factors Act, 1823, in *Hansard*, 1823, Vol. 9, col. 211.

1 Illustrated by the Bankruptcy and Deeds of Arrangement Act. 1913, s. 15; see *Curtis* v. *Maloney* [1950] 2 All E.R. 982.

2 Harvey, *Victims of Fraud*, discusses the place of this idea in (inter alia) commercial law in some detail though unsatisfactorily. *Cf.* also an expression of the idea in the overwide and much reiterated dictum of Ashurst J. in *Lickbarrow* v. *Mason* (1787) 2 T.R. 70.

3 *Cf. Compania Naviera, etc.* v. *Churchill, etc.* [1906] 1 K.B. 237.

4 *Cf. Brandt* v. *Liverpool, etc., S. N. Co.* [1924] 1 K.B. 575.

5 *Cf. Howard* v. *Tucker* (1831) 1 B. & Ad. 712. Similarly, "the conclusive evidence clause": Scrutton, *Charterparties*, 15th ed., 71.

6 (1863) 2 H. & C. 164.

Pickard v. *Seears*,[7] and *Commonwealth Trust* v. *Akotey*,[8] (iv) the "reputed ownership" section 38 of the Bankruptcy Act, 1914, (v) the "apparent possession" rule in the Bills of Sale Act, 1878, ss. 4 and 8, (vi) the rules regarding the class of sales referred to in the Sale of Goods Act, 1893, s. 21 (2) (*b*),[9] (vii) sections 22–26 of the 1893 Act, (viii) the provisions of the Factors Act, 1889, regulating the power of pledge and disposition of mercantile agents, and (ix) certain special Acts conferring the quality of negotiability upon certain otherwise non-negotiable documents of title to goods used in particular localities [10] or by particular organisations.[11]

Confining one's attention here to the third party cases involved in the agency rules above, the rules regarding bills of lading, sections 22-25 of the 1893 Act and the fundamental mistake cases, the ground of commercial convenience in this regard has been judicially specified, in gist, as follows [12] : that the pursuit and recovery of goods through any number, it might be, of bona fide purchasers would be a great inconvenience and an impediment to trade not merely because of the dislocation in the particular transactions undone but because this kind of dislocation must tend to undermine the confidence of the business community. For this tendency in fact to be produced, it is necessary, in my opinion, that either of two conditions be fulfilled: the confidence of the business community would be seriously shaken if the kind of commercial transaction undone is of substantial importance in the branch of commerce to which it belongs and/or the transaction and its dislocation recur with sufficient frequency to make the possibility of dislocation an overshadowing fear in the minds of businessmen. The classical illustration of the validity of these conditions is afforded by the principle of negotiability as manifested in the law of negotiable instruments. In the sphere of chattels law here discussed, both conditions are fulfilled in the case of the ostensible authority rule and Factors Act provisions, by dint of the central function and multiplicity of activity of the agent in commerce and the apparently high incidence of commercial fraud among mercantile agents at least in the nineteenth century.[13] The first condition at any rate is fulfilled in the case of section 26 of the Sale of Goods Act, and again in the case of bills of lading and sections 23 and 25 of the Sale of Goods Act, in view of the need for certainty and of the importance of being able to rely on the face value of title-documents in international commercial

[7] (1837) 6 A. & E. 469.
[8] [1926] A.C. 72.
[9] See cases cited in Chalmers, *Sale of Goods*, 12th ed., 82 n. (*m*).
[10] Thus, the Mersey Docks Acts Consolidation Act, 1858, s. 200, and Port of London (Consolidation) Act, 1920, ss. 166–8.
[11] Thus, the Trafford Park Act, 1904, ss. 33–5, and Liverpool Mineral and Metal Storage Co., Ltd. (Delivery Warrants) Act, 1921, ss. 3, 4 & 9. See Purchase, *Documents of Title to Goods*, 223–6.
[12] *White* v. *Garden* (1851) 10 C.B. 919, 928 (Jervis C.J.).
[13] From the quantity of litigation: see Purchase, *op. cit.*, Chaps. 6 & 7. No other kind of quantified data, of course, exists.

transactions and other commercial transactions in bulk or bulky commodities. But the detailed pursuance of these matters is not appropriate here. The rule in *market overt*, too, is not the special concern of the present discussion, though one might say with some certainty that, save possibly in the case of some local out-of-the-way markets, *market overt* fulfils neither of the conditions and is quite unsupportable nowadays by considerations of commercial convenience.[14]

Turning to the third party mistake cases, three features are clear: first, they rarely occur[15]; second, no major institution or branch of trade hinges upon the fact that the law of fundamental mistake might deprive a third party of his purchase; and, third, it seems true to say, from the lack of agitation in business circles and from personal experience and observation, that the possibility that a third party might be deprived in this way in no wise affects the course and volume of business by transferring the businessman's anxiety regarding the soundness of his transaction from the commercial risk involved to the possibility of title risk. Conversely, if the common law of mistake gave way to equity, the possibility that vendors might suffer loss in such cases would form no impediment to business. Already, indeed, vendors labour under a measurable burden of title risk in their transactions by virtue of the pertinent rules of the negotiability of chattels doctrine, but it is never argued that this title risk that vendors run impedes business. The additional weight of risk resulting from the third party mistake cases would, if only because of their rarity, be negligible. It follows, in other words, that in this respect the significance of the mistake cases is that they are commercially insignificant.[16]

The way, is, therefore, left open for a legal formula which will enable the courts to attend to the needs of individual justice in each isolated case, a formula centred upon the current notion of fault liability. In *Solle* v. *Butcher*, Denning L.J. in alleging that the common law doctrine of mistake had been extended beyond its "proper limits,"[17] described this as "a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract,"[18] adding, "In the well-known case of *Cundy*

[14] *Cf.* Pollock in 8 L.Q.R. (1892) 105–6, and *Bishopsgate Motor Finance Corporation* v. *Transport & Brakes, Ltd.* [1949] 1 K.B. 322.

[15] I have been able to count only four in the past eighty-eight years: *Hardman* v. *Booth*, *supra*; *Hollins* v. *Fowler* (1875) L.R. 7 H.L. 757; *Cundy* v. *Lindsay*, *supra*; and *King's Norton Metal Co.* v. *Edridge*, *supra*. *Phillips* v. *Brooks* [1919] 2 K.B. 243, can no longer be regarded as such a case: *cf.* 13 M.L.R. 66.

[16] The argument that mistake cases ought to continue the logical tendency of the negotiability of chattels doctrine may be answered by saying that, subject to overriding commercial needs not present in the mistake cases, the justice of each case should be regarded in preference to the attainment of symmetry in commercial law.

[17] *Supra*, 691.

[18] *Ibid.*

v. *Lindsay*, Cundy suffered such an injustice."[19] However apt Denning L.J.'s concern may be in the particular instance of *Cundy* v. *Lindsay*, the simple substitution of contract-voidability for contract-nullity, that is to say, the simple favouring of the third party exclusively in mistake cases would not necessarily create the conditions in which justice would always be done. The simple operation of the primary rules of title is here unjust in that these rules take no account of the fault of either party in a situation in which one party alone may be at fault, or there may be bilateral fault or indeed bilateral no-fault. Thus, while, it is true, no reported mistake case has involved a situation in which the third party was more at fault than the original vendor, at least three cases show facts in which the original vendor, assuming his standard of care to be no more than that of a reasonably prudent businessman, was at any rate equally as innocent as the third party: *viz.*, *Hardman* v. *Booth*,[20] *Hollins* v. *Fowler*[21] and *King's Norton Metal Co.* v. *Edridge*.[22] In such cases as these it is just as unfair to protect the possession of the third party simply as to restore possession simply to the original vendor. The simple, constant protection of the third party in such cases smacks of a win-or-lose, all or nothing, untwentieth century crudeness. Somewhat more refined is the proposal of certain learned writers that the doctrine of estoppel be applied against the original vendor where he is, in a practical commercial sense, negligent.[23] This rule too, in the present context, suffers from the defect of failing to provide adequately for the possibilities of equal fault or equal no-fault.

Clearly, I think, the third party mistake situations afford a suitable case for the extension to them of the principle of apportionment of damages that recently was introduced with so much benefit into the general law of tort.[24] In the present context, it might take the form of some such rule as that the third party is vested with a right to retain or return the goods subject to the apportionment between them of the total loss suffered by the original vendor and third party in proportion to their respective commercial fault.[25] But a rule of this kind would require legislative introduction.

Here, the simple replacement of common law by equity, of contract-nullity by contract-voidability, would do no harm, but no other good than the rationalisation of systems.

[19] *Ibid.*
[20] *Supra.*
[21] *Supra.*
[22] *Supra.*
[23] Cheshire & Fifoot, *Law of Contract*, 2nd ed., 179–80.
[24] Law Reform (Contributory Negligence) Act, 1945.
[25] See also the suggestion made in *The Reform of the Law* (ed. Professor Glanville Williams), at 73. As already mentioned, in the *non est factum* third party cases, the substitution of equity for common law would simply preserve the *status quo*. Apart, however, from the negotiable instruments cases where commercial convenience is overriding, the apportionment principle might with advantage be applied to relevant *non est factum* situations.

Cases Requiring Adjustment and Compensation

It is in those cases where a somewhat complicated readjustment between contracting parties is necessary to achieve a fair result to the dispute between them that the superior quality of the remedy in equity is thrown into high relief and the substitution of equitable for common law rules would produce the most beneficial consequences.

Socially speaking, the most important illustration of this theme up to the present time is that embodied in *Solle* v. *Butcher* itself.[26] The bilateral mistake there regarding the vital quality of the subject-matter or the "fundamental" right to charge the higher rent was, in my respectful submission, sufficient, technically, to render the lease void *ab initio* at common law.[27] The effect of this would have been to preclude the initial creation of a contractual tenancy and so strip the putative tenant of the protection of the Rent Restriction Acts.[28] The putative tenant, now licensee, would then have been rightfully ejectable by the lessor and—the significant point—it would not have lain with the court to attach conditions to the common law remedy. It requires only a slight exercise of the imagination to envisage the harmful consequences of imposing the rigid common law rule on this highly specialised part of the environment of planning law. Thus, it might have been the case of the landlord taking advantage of his strict common law right in order to obtain vacant possession of his premises. Further, other "facts" under the Rent Restriction Acts come to mind that might be argued as "fundamental" in the common law-equity sense, like "dwelling-

[26] *Cooper* v. *Phibbs*, was, in its day, another example. Thus, the bilateral mistake made in *Cooper* regarding the title to the land leased might well at common law have made the lease void *ab initio*, as a mistake referring to a "fundamental fact" (*pace* Denning L.J. *Solle*, *supra*, 694. But *pro.*, Lord Wright, *Norwich Union Fire Insurance*, *supra*, 463, and Lords Atkin and Thankerton, *Bell* v. *Lever Bros.*, *supra*, 218, 253–6). In that event, the mistaken lessee would have been affirmed in his rightful position as tenant for life, but as it would not have been open to a common law court to grant a compensatory equitable lien in favour of the mistaken lessors, the appellant would have received for nothing the improvements made by respondents' father under a mistaken impression that he was the owner in fee simple. The machinery of adjustment and compensation of which the court of equity disposed enabled it to reach a juster conclusion. Today, however, it would be possible in a court of amalgamated jurisdiction to counterclaim the equitable lien in the common law action. Similarly, in *Hart* v. *Swaine*, *supra*, a claim for an account would today be possible though the action were founded on a fundamental mistake at common law.

However, in *Allcard* v. *Walker*, *supra*, where the terms attached could not form a proper subject for a claim or counterclaim in equity, it would appear that if, as a matter of pure hypothesis, it had been sought to set aside the consent order as being void at common law for fundamental mistake, the terms in question could not have been attached to the judgment and an element of justice would have been lacking.

[27] See nn. 26, 27, 42 and 45, *supra*, and discussion in text.

[28] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, and commentary thereon in Megarry, *op. cit.*, or "Law Notes," *op. cit.*

house "[29] and "furnished"[30] dwelling-house, "rateable value"[31] or "standard rent."[32] Assuming that the courts accepted such "facts" as these as "fundamental" and assuming, additionally, a set of circumstances rendering it unavoidable that the court give effect to the mistake in question,[33] then the putative tenant's security of tenure, which is one of the cardinal aims of the rent restriction statutes, would be uncatastrophically but to a measurable degree impaired.

Both Denning[34] and Jenkins L.JJ. showed themselves fully conscious of this danger, the former for the right, the latter, with great respect, for the wrong reason. Jenkins L.J. said: "If the landlord could procure rescission of the tenancy merely by alleging and proving that he and the tenant entered into the tenancy under a mutual mistake to the effect that the Acts imposed no restrictions on the rent which could legally be charged, the whole object of the Acts would . . . be frustrated in such a case. . . . If when a tenant claims his rights under the Acts the landlord can say, "We neither of us knew the Acts applied," or "We both thought the Acts did not apply," and threaten rescission, the tenant must either risk rescission and consequent ejectment or else submit to pay whatever the landlord demands as consideration for renouncing his right to rescind."[35] Whether Jenkins L.J. was influenced in his finding of mistake of law by this looming danger, or not at all, can only be matter for surmise. In my respectful opinion, however, one of the most significant features of *Solle* v. *Butcher* and the point overlooked by Jenkins L.J. was that justice was done in *Solle*,[36] that, though the lease was rescinded, there followed no "consequent ejectment" because the majority decision was founded upon the equitable rules and not those of common law.

So, in equity, the lease was voidable *ab initio* with the result that, once rescinded, the contractual tenancy was as though it had never been.[37] But the residuary discretion of which the court disposed enabled it to secure the licensee, no longer protected by the Acts, in his tenure, and the lessor in the higher rent which but for the mistake he would have been entitled to charge.

While it would appear from the reported judgments and arguments of counsel that *Solle* was confined to the considerations in equity alone, it does seem to follow, in my opinion, from the extract

[29] 1920 Act, s. 12 (2) and case-law gloss. See works cited in previous note.
[30] 1920 Act, s. 12 (2), Rent, etc., Restrictions (Amendment) Act, 1923, s. 10 (1), and Rent, etc., Restrictions Act, 1939, s. 3 (2).
[31] 1920 Act, s. 12 (1), as amended by 1939 Act, First Sched.
[32] *Ibid.*
[33] In accordance with the rules making up what I called in my previous article the Principle of Objective Appearances.
[34] *Supra*, 692.
[35] *Supra*, 706.
[36] *Pace*, Professor Goodhart, 66 L.Q.R. (1950) 173.
[37] *Semble*, assumed in the judgments; explicit in extract from the record of the post-judgment discussion between court and counsel quoted later in text above.

below of the record of the arguments between court and counsel after judgment given, that the common law aspect of the case too had been submitted to the court:

"Mr. Levy: The position would appear to be that the lease was not void *ab initio*, but, having been avoided, that operates from the moment of its grant and, therefore, there has been no rent at all of these premises in the course of the occupation by the plaintiff. He has been occupying as a licensee pure and simple, subject to the payment of a certain sum annually, namely, £250 . . . Lord Justice Denning: Those are substantially the terms . . ." [38]

If the common law case also was urged, then, because of the divergent consequences of applying common law or equity, a criterion for selecting between the two sets of rules became vital to the decision of the case. In that event, the criterion Denning L.J. formulated in the shape of his restatement ought justly to be regarded as forming part of the *ratio decidendi* of the learned Lord Justice. If, however, my submission be sound that the "agreement-to-all-outward-appearances" criterion of Denning L.J. is fallacious, it becomes extremely difficult to see what resistance a court could legitimately offer to a landlord who persisted in demanding his common law right, apart from a finding in that case of mistake of law or of "collateral" fact or a bilateral mistake impliedly absolute and unconditional [39]; or unless equity is indeed in this sphere paramount to common law, which leads to the nuclear issue of whether, in the sphere of contractual mistake "any conflict or variance exists between the rules of equity and the rules of common law with reference to the same matter." [40]

"Conflict or Variance?"

The perplexing feature of the common law-equity relationship in this regard is that, whilst nearly all judicial references in this field are to the concurrent nature of the jurisdiction and some, in the post–1875 cases, expressly postulate a parallelism between the common law and equity rules, the hard fact remains that there is a difference between the legal consequences of applying equity or common law to the facts of the same mistake situation in at any rate two types of cases and that the difference in consequence is not only theoretical but practical.

A review of the technical arguments against the existence of a "conflict or variance" in contractual mistake might commence with the observation that, at common law, a contract induced by a fraudulent misrepresentation relating to a "fundamental fact" is

[38] From p. 22 of a typescript copy of the judgment in *Solle* v. *Butcher*, dated November 25, 1949, being a transcript of the shorthand notes of Barnet, Lenton & Co., 46–7 Chancery Lane, London, W.C.2.

[39] *Cf.* 13 M.L.R. 59–60, and Professor Goodhart's hypothetical Whiteacre oil well case in 66 L.Q.R. (1950) 170.

[40] Judicature Act, 1925, s. 44.

both voidable for misrepresentation and void for fundamental mistake. Which rule the plaintiff sees fit to invoke will depend on the convenience in his case. In *Cundy* v. *Lindsay*, the plaintiff invoked the fundamental mistake rule, for on that alone could he have won. On the other hand, the plaintiffs in *Gordon* v. *Street* [41] and *Sowler* v. *Potter* [42] hedged their case by arguing the rules in the alternative and the court found the contracts in those cases to be alternatively void and voidable at common law. But whether the existence of rules, both supplementary and to an extent contradictory, at common law is a valid argument in favour of the co-existence of contradictory rules of common law and equity is highly debatable. A more relevant argument is that in the third party cases of *Cundy* v. *Lindsay* and *King's Norton Metal Co.* v. *Edridge*, the courts would, had there been a "conflict" between common law and equity, have been obliged to apply equity and so find against the plaintiff in the former as well as in the latter. That the courts did not do so, it may be argued, constitutes authority *sub silentio* that no "conflict" of the kind discussed exists. To this it may be replied that the weakness and indirectness of an authority *sub silentio* ought not forever to bar the courts from finding a legal "conflict" in cases where a conflict of consequences is so plainly present. Finally, there are the express judicial opinions. *Cochrane* v. *Willis*, *Huddersfield Banking Co.* v. *Lister*, *Scott* v. *Coulson*, and *Norwich Union Fire Insurance Society* v. *Price* were all cases involving a bilateral mistake relating to a "fundamental fact," no third party interests supervening. In all, the courts opined that the contracts in question were both void at common law and voidable in equity. In all, the courts regarded the application of common law and equity as concurrent.[43] In *Scott* v. *Coulson* it was indeed remarked that, as the common law settled the case, "the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognised as the basis is not true." [44] But this remark seems to have gone to the matter of convenience of court argument and not to the matter of principle. From *Cochrane*, however, to *Norwich Union Fire Insurance Society*, no situation was implicated, wherein the difference between applying equity or common law was more than theoretical. It is, in my opinion, another aspect of significance in *Solle* v. *Butcher*, that there, where the difference between applying equity or common law was vital, Denning L.J. who alone of the court met this issue, found it impossible merely to reiterate the parallelism indicated in those previous cases; although, it is true, the learned Lord Justice sought a solution in a

[41] [1899] 2 Q.B. 641.

[42] [1940] 1 K.B. 271.

[43] *Cochrane*, *supra*, 63; *Huddersfield Banking Co.*, *supra*, 281; *Scott*, *supra*, 252, 253 (also Lord Warrington, *Bell* v. *Lever*, *supra*, 206); *Norwich Union Fire Insurance*, *supra*, 462–3 (by clear implication).

[44] *Supra*, 252.

restatement intended to reconcile the divergent rules of common law and equity and not in a finding of "conflict."

The meaning of the "conflict or variance" phrase has never really received in the cases the sharpness of precise definition. There are many illustrations but of no all-embracing test principle. Authority in favour of a "conflict" may begin with Earl Cairns' interpretation of the phrase in *Pugh* v. *Heath* [45] in the well-known words: "The court is now not a court of law or a court of equity; it is a court of complete jurisdiction; and if there were a variance between what, before the Judicature Act, a court of law and a court of equity would have done, the rule of the court of equity must now prevail." [46] Although this definition is defective in that, on its face, it omits to refer to differences due to the supplemental function of equity, like the granting of specific performance where common law disposed only of damages, none the less, whether the definition be applied to contractual mistake cases in a large or in a narrow, literal sense, the result of the application is that a "conflict" there exists.

Again, where a contract is induced by an innocent misrepresentation, relating to a "fact" that is not "fundamental" but "collateral," the common law view is that the contract remains unaffected and valid, whilst in equity the contract is voidable. In the opinion of Jessel M.R. this difference in consequences gave rise to a legal "conflict" for the learned Master of the Rolls in *Redgrave* v. *Hurd* [47] asserted: "As regards the rescission of a contract, there was no doubt a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of courts of equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. . . . As regards the rule of common law there is no doubt it was not quite so wide." [48] If, then, a "conflict" follows from the disparate consequences of applying equity or common law in such a case, it is, I would submit, strongly arguable by way of analogy that where common law stamps a contract as void and equity the same contract as voidable with a vital difference of practical results, a "conflict" similarly exists.

The other arguments in favour are those to which reference has already been made: that the difference between applying equity or common law is in two classes of cases crucial and that the replacement of the common law of contractual mistake by the

[45] (1882) 7 A.C. 235.
[46] *Ibid.*, 237.
[47] (1881) 20 Ch.D. 1.
[48] *Ibid.*, 12–13. If Jessel M.R. is taken—which is exceedingly doubtful—to be referring to innocent misrepresentation regarding "fundamental" facts only, the "conflict" implications of his statement are even wider.

corresponding equitable rules is for three reasons desirable: first, because it would resolve the difficulty in cases like *Solle* v. *Butcher* and would certainly do no more individual injustice than at present in the third party cases; and, secondly, because the residuary discretion it would vest in the courts in all mistake cases would insure against possible, difficult, future contingencies arising, especially, from an increasing volume of planning law; and, thirdly, because it would to a considerable degree simplify the law in that two systems of law would no longer be employed where one is demonstrably enough.

In whatever event, should the landlord in another *Solle* v. *Butcher* insist on his common law rights or counsel for the defendant in another *Cundy* v. *Lindsay* plead that the original contract of sale was only voidable in equity and equity prevails, it will become essential for the courts to solve these puzzling features of the common law-equity relationship in this part of the law. Denning L.J.'s restatement will require a considerable amount of defining and refining before it is satisfactorily usable for the reasons already given that its pith is too vague and runs counter to the established grain of authority. The simple substitution of equity for common law is, in my respectful submission, preferable partly because it would be technically feasible, partly because its consequences are both foreseeable and desirable, partly because what is of value in common law learning would be fused, and finally, because such contrary authority as exists is not so direct or strong that it may not with little strain be overridden.

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EQUITABLE ESTOPPEL TODAY

I

When this article was first drafted *Combe* v. *Combe* was unreversed and *Candler* v. *Crane, Christmas & Co.* was unheard of. These decisions occasioned the second draft which, barely completed, was rendered inadequate by Mr. J. F. Wilson's article in the *Law Quarterly Review*. Resolve to begin again coincided more or less with *Mitas* v. *Hyams*, and a belief began to germinate that an alteration had only to be made to this article to evoke, by some kind of telepathy, an important judicial or juristic pronouncement on the subject. The latest of these is Lord Justice Denning's article in this journal: a contribution which is doubly valuable for coming from a lawyer who has been largely responsible for the recent decisions. So rapidly have developments been taking place in this branch of the law that "today" may turn out to be more literal than was at first intended.

George Spencer Bower, in his work on estoppel [1] pours scorn on the term "equitable estoppel" and criticises Lord Selborne [2] for using the expression. In Spencer Bower's view (pp. 16–18), all cases of so-called equitable estoppel fall into one of the following three categories: (1) actions for damages or rescission based on fraudulent misrepresentation; (2) actions to enforce performance of contracts; (3) estoppel where there would also be estoppel at common law. The first two categories are not estoppel, and the third does not merit the adjective "equitable."

Notwithstanding the weight attaching to Spencer Bower's statements, it is submitted that equity has a strong claim to recognition on the subject of estoppel. In the first place, although estoppel by representation has become a feature of the common law,[3] that has happened by way of common law adoption of principles worked out in the Court of Chancery. In the seventeenth century common law, estoppel by representation resulted only from the doing of an act of notoriety, such as livery of seisin [4]—hence the term "estoppel in pais." [5] The Court of Chancery recognised early on

1 *Law Relating to Estoppel by Representation.* See also *Canadian Pacific Ry.* v. *R.* [1931] A.C. 414, at p. 429.

2 In *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L.R. 6 H.L. 352, at p. 360.

3 See W. S. Holdsworth, *History of English Law*, Vol. 9, p. 162: "... the root principle of estoppel by conduct was in effect recognised both by the courts of common law and by the court of Chancery in the latter part of the eighteenth century."

4 Coke's *Institutes*, p. 352a; Parke B. in *Lyon* v. *Reed* (1844) 13 M. & W. 285, at p. 309; W. Ashburner, *Principles of Equity*, 2nd ed., p. 445: "Such were livery, entry, acceptance of rent, partition, acceptance of an estate."

5 Spencer Bower, *op. cit.*, at pp. 4–5, discusses the expression "in pais" or "in paiis."

that even informal representations could give rise to estoppel.[6] This doctrine was not introduced into the common law until the late eighteenth century.[7] In the second place, it would appear that equitable estoppel, or at least some allied principle, can come into play in respect of a representation that could not found an estoppel at common law. The estoppel, or quasi-estoppel, or whatever other name will eventually adhere to the *High Trees* cases, which results from a statement of intention, appears from the declarations of its progenitors to be founded in equity. In the third place, there are results of estoppel in equity which do not result from estoppel at common law. In *Hunt* v. *Carew*,[8] for example, the first defendant was seised of an estate for life, with remainder in tail to his son. The plaintiff, thinking the father had an estate of inheritance, approached the son (who was the other defendant) for his assistance in procuring a lease from the father, determinable upon lives, offering a £400 fine and a small yearly rent. The son, who knew the true state of the title, informed the plaintiff that his father had power to make such a lease, the father purported to grant it, and the son received £300 of the fine. It was, however, no part of the agreement that the son should receive this money. When the plaintiff discovered that the father had no power to grant the lease, he brought a bill in Chancery. The court ordered: "That since the plaintiff was not acquainted that the father had exceeded his power, and he relying on the affirmation of the son (who had most of the money) that the lease would be good without his joining, by which he was deceived; that therefore both should join at their own costs to make an assurance, and confirm the lease to the plaintiff during the estate thereby granted."[9] This case does not fall within Spencer Bower's first category, as the claim was for neither damages nor rescission; it does not fall within his second category, as the son made no promise to grant a lease himself, nor did he even warrant that his father could do so; and it did not at the time fall within the third category, as only the father had done an act of a kind which could then result in estoppel at common law; while at no time could a common law court have made an order of the type made in that case. Yet, although there was no mention of the word "estoppel" in *Hunt* v. *Carew*, the principle upon which the case was decided is that underlying estoppel in equity,[10] and no court has decided that the consequences which resulted from that estoppel could not result from equitable estoppel still.

[6] *Hunt* v. *Carew* (1649) Nels. 46.

[7] *Montefiori* v. *Montefiori* (1762) 1 W.Bl. 363.

[8] (1649) Nels. 46. See also *Dyer* v. *Dyer* (1682) 2 Ch.Cas. 108; *Hobbs* v. *Norton* (1682) 1 Vern. 136; *Hunsden* v. *Cheyney* (1690) 2 Vern. 150.

[9] Nels. 48.

[10] See Holdsworth, *op. cit.*, Vol. 9, p. 161.

II—WHEN ESTOPPEL EXISTS

Leaving aside for the moment the *High Trees* cases, estoppel by representation arises on the same occasions in equity and at common law. Where a person, knowing all the relevant circumstances, makes a representation to another, and thereby induces him to act upon it to his detriment,[11] there is an estoppel.[12] The maker of the statement, at the very least, is not allowed to come into court, in proceedings between himself and the person to whom he made the statement, and deny the truth of what he himself has said. The same sense was differently expressed in the common law case of *Pickard* v. *Sears*,[13] where Lord Denman C.J., delivering the judgment of the court, said: "Where one by his words or conduct wilfully [14] causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The representation, in order to operate by way of estoppel, must be unambiguous,[15] but need not be in any special form: it may be verbal, or consist of conduct other than the uttering of words, including mere silence if the occasion is such that there is a duty to speak. An example of a verbal representation is furnished by *Hunt* v. *Carew*,[16] and of estoppel by conduct, by *Waldron* v. *Sloper*.[17] In *Hunsden* v. *Cheyney*,[18] a mother, who was the absolute owner of a term, was present at a treaty for her son's marriage, and she stood by silent when she heard her son declare that the term was to come to him at his mother's death. She was also a witness to the deed whereby the reversion of the term was settled on the issue of the marriage after the mother's death, though this was not a decisive point.[19] It was held that the mother was compellable in equity to make good the settlement, and to settle the reversion of the term accordingly after her death. That was a case of estoppel arising from silence where there was a duty to speak. "The duty to speak can only arise, in cases where there is no fiduciary relation between the parties, and where the contract [20] is not a contract

11 See J. F. Wilson, "Recent Developments in Estoppel," 67 *Law Quarterly Review*, 330.

12 See *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L.R. 6 H.L. 352, at p. 360, *per* Lord Selborne.

13 (1837) 6 A. & E. 469, at p. 474.

14 The word "wilfully" appears to be superfluous: see footnote (g) on p. 9 of Spencer Bower (*op. cit.*).

15 *Low* v. *Bouverie* [1891] 3 Ch. 82.

16 (1649) Nels. 46.

17 (1852) 1 Drew. 193.

18 (1690) 2 Vern. 150.

19 A person witnessing a document would only be estopped by virtue of being a witness—at most—from denying the formality of its execution. In *Hunsden* v. *Cheyney*, the mother swore she did not know the true facts, but it is not clear from the report that she was believed.

20 That is, if there is a contract at all. These rules are not confined to parties to a contract.

uberrimae fidei, if the circumstances are such that it would be inequitable to keep silence." [21] It is inequitable, presumably, where a reasonable observer would deduce from the silence that there was nothing to disclose.

Thus equity and the common law share the principles. Estoppel by representation arises in equity upon the same criteria as those applied by the common law. But there the similarity ends. True, estoppel is a rule of evidence in both equity and common law cases, but only in equity is it anything more besides.

III—Estoppel as a Cause of Action

It has been said [22] that there is an estoppel only where it proves an existing claim or defence. Estoppel is commonly taken to signify prevention of denial. Where a statement gives rise to an estoppel, the maker of the statement must "make his representation good," *i.e.*, the parties must be dealt with on the footing that the statement is true. But this pretence does not make it true, and it may be necessary to do something further in order to bring that about. And there estoppel may become a cause of action, which is a purely equitable notion.

Now, it has been said so often, and by so many, that estoppel is a rule of evidence, and not a cause of action, that there is a danger of this being believed as a matter of course, and of any statement to the contrary being dismissed as heresy. Admittedly, strong substantiation is required for any declaration that a long accepted proposition is untrue, and it is only a beginning to record that equitable estoppel was referred to, in contradistinction to common law estoppel, as being a cause of action, in *Williams* v. *Pinckney*.[23] There, Vaughan Williams L.J. said: "The common law doctrine of estoppel is of a very personal nature, and only exists between parties to the transaction. It is part of the law of evidence, and is not the same as the equitable doctrine. You cannot found an action on it as you can in equity."

A good illustration of estoppel operating as a cause of action is provided by *Hunt* v. *Carew* [24]: in that case there was clearly no cause of action against the son apart from the estoppel. There was fraud here, and in *Evans* v. *Bicknell*,[25] again, there are dicta to the effect that estoppel founded on fraud is a cause of action. There was no cause of action against the trustee in that case apart from the estoppel, this being a case in Chancery, though there may have been an action at law grounded on *Pasley* v. *Freeman*.[26]

[21] Ashburner, *op. cit.*, p. 451.
[22] *e.g.*, in *Low* v. *Bouverie* [1891] 3 Ch. 82, at p. 112, *per* Kay L.J.
[23] (1897) 67 L.J.Ch. 34, at p. 37.
[24] (1649) Nels. 46. See p. 326, *ante*.
[25] (1801) 6 Ves. 174.
[26] (1789) 3 T.R. 51. In *Evans* v. *Bicknell*, Lord Eldon gave it as his opinion that the claim in *Pasley* v. *Freeman* itself ought to have been brought as a case of equitable estoppel.

In *Dyer* v. *Dyer*,[27] it was held that there would be no estoppel arising out of an innocent misrepresentation. In *Hobbs* v. *Norton*,[28] on the other hand, an innocent misrepresentation was held to estop, but the estoppel in that case did not operate as a cause of action. Eight years later, however, in *Hunsden* v. *Cheyney*,[29] an apparently grossly negligent misrepresentation was successfully used by way of estoppel to found a cause of action. A further case on these lines is *Burrowes* v. *Lock*,[30] where a trustee represented a share in a trust fund to be unincumbered, whereas in fact incumbrances upon it did exist. When he was sued, he pleaded that he had forgotten about the incumbrances when he made the representation. The plaintiff had taken an assignment of the share on the faith of the trustee's statement, and now recovered compensation from him in respect of the incumbrances. Ashburner [31] suggests that the cause of action was the refusal of the trustee to hand over the unincumbered share assigned, but this was not the ground upon which the case was decided, and it is submitted that the claim against the trustee arose out of the estoppel. Sir W. Grant M.R.[32] was content to let the estoppel arise out of gross negligence if fraud could not be proved. This is merely an extension to cases of gross negligence of the principle laid down with respect to fraud in *Arnot* v. *Biscoe* [33]: that where a person makes a representation enabling another to gain from a third person, the maker of the representation is liable to pay out of his own pocket all the loss of the third person.[34] The maker of the representation is estopped, and that creates a cause of action against him. The action is one to compel the making good of the representation, and if this cannot be literally done, compensation in money will be awarded instead.[35]

Further support for the view that equitable estoppel may operate as a cause of action is to be found in *Rawlins* v. *Wickham* [36] and *Slim* v. *Croucher*.[37] In the latter case, on the occasion of a loan upon the security of a lease, which the borrower represented himself

27 (1682) 2 Ch.Cas. 108.
28 (1682) 1 Vern. 136.
29 (1690) 2 Vern. 150.
30 (1805) 10 Ves. 470. And see *Pearson* v. *Morgan* (1788) 2 Bro.C.C. 388. This is wrongly paged in the English Reports: it appears in Vol. 29, p. 214.
31 *Op. cit.*, p. 447.
32 10 Ves. 475–476. And see *Pulsford* v. *Richards* (1853) 17 Beav. 87
33 (1743) 1 Ves. Sen. 95.
34 See *Evans* v. *Bicknell* (1801) 6 Ves. 174, at pp. 176–177. In *Hutton* v. *Rossiter* (1855) 7 De G.M. & G. 9, *Evans* v. *Bicknell* was followed in the Court of Appeal in Chancery, and Turner L.J. said (at pp. 22–23): "Observations have been made with reference to what passed in the House of Lords in the case of *Jorden* v. *Money* (5 H.L.C. 185). I have looked at the report of that case, and I find that it turned, as I supposed it did, upon the facts. The principle of law upon the subject does not seem to have been questioned."
35 See 6 Ves. 180; *Grant* v. *Munt* (1815) G.Coop. 173.
36 (1858) 3 De G. & J. 304.
37 (1860) 1 De G.F. & J. 518. And see *Lake* v. *Brutton* (1856) 8 De G.M. & G. 440; *Re Ward* (1862) 31 Beav. 1; *Stephens* v. *Venables* (*No.* 2) (1862) 31 Beav. 124; *Hill* v. *Lane* (1870) L.R. 11 Eq. 215.

as entitled to have granted to him for ninety-eight and a half years, the lender required a written intimation from the alleged lessor of his intention to grant the lease. The lessor, knowing of its purpose, signed the required intimation. The loan was made on the faith of it, and afterwards the lessor purported to grant a lease, which was then mortgaged by the borrower to the lender. It subsequently transpired that the lessor had some time before demised the same premises for the same term to the borrower, by whom that lease had since been assigned for value, and that therefore the lender had no interest in the land. It was held that the court had jurisdiction to direct repayment by the lessor to the lender of the sum which he had advanced, with interest, and that it was a proper case for the exercise of such jurisdiction, although the lessor was not shown to have been guilty of fraud or of having done more than forgotten the earlier lease when he signed the intimation and granted the second. The lessor's misrepresentation was negligent, and he was estopped by it. His statement that he intended to grant a lease included a statement of fact, namely, that he had power to grant a valid lease. He was bound to make good his statement that he had such power, but as this could not be literally done, he was ordered to pay compensation in money instead. There was no cause of action apart from the estoppel.

These cases, which involved a fraudulent or negligent, but never a duly careful innocent,[38] misrepresentation were so closely akin to the common law line of cases following in the wake of *Pasley* v. *Freeman*[39] that the principles tended to become confused. In consequence, the decisions in *Derry* v. *Peek*[40] and *Le Lievre* v. *Gould*[41] have been thought to apply to equitable estoppel as well as to the similar common law action. The result of these decisions is that the action in tort for deceit can be brought only where there is fraud and that there is no action for negligence (in the absence of some contractual or fiduciary duty) in respect of words uttered. Yet equitable estoppel applied to negligent misstatements; moreover, the equitable machinery for taking an account ensured greater accuracy in computing the amount due from the defendant than the common law method of leaving it to the jury to assess damages.[42] *Derry* v. *Peek* was not fought on the basis of estoppel, but as a common law action for deceit, and any passages in the speeches referring to the equitable principles were obiter dicta. Lord Esher M.R. in *Tomlinson* v. *Balkis Consolidated Co.*,[43] says that *Derry* v. *Peek* "has nothing whatever to do with the

[38] *Merewether* v. *Shaw* (1789) 2 Cox Eq.Cas. 124.
[39] (1789) 3 T.R. 51.
[40] (1889) 14 App.Cas. 337.
[41] [1893] 1 Q.B. 491.
[42] *Cf.* S. Alward, "A New Phase of Equitable Estoppel," 18 *Harvard Law Review*, 113, at p. 118. He deals with *Ewing* v. *Dominion Bank*, 35 Can.Supr. Ct. 133, a doubtful case of estoppel.
[43] [1891] 2 Q.B. 614.

doctrine of estoppel." It is therefore submitted that it is still possible today to obtain redress in respect of a negligent misrepresentation on the basis of equitable estoppel. Professor W. A. Seavey suggests [44] as much of America: "In most jurisdictions, unless one knows a statement to be false or was reckless in making it, there is no liability for causing merely economic loss even though the statement involved a misrepresentation of fact and was made with the intention that another rely upon it. It is in this area, however, that we find the chief application of the anomalous doctrine of estoppel, anomalous because of its sporadic operation. Where the doctrine applies, not only does one become responsible for innocent misrepresentation, but he may also become subject to liability for failing to use means at his disposal to undeceive another."

There is, however, a variation in the United States on this matter from jurisdiction to jurisdiction. Some authorities contrary to *Derry* v. *Peek* are given by J. Smith,[45] while the case of *Ultramares Corporation* v. *Touche*,[46] decided by Cardozo J., which is quoted from at length by Cohen L.J. (as he then was), in *Candler* v. *Crane, Christmas & Co.*,[47] clearly supports *Le Lievre* v. *Gould*. While one may sympathise with the able effort of Denning L.J. in *Candler* v. *Crane, Christmas & Co.* (at pp. 373–382), to base liability for negligent misstatement on *Donoghue* v. *Stevenson*,[48] it now seems unlikely that any tribunal in this country will be so persuaded. In the absence of legislation on the subject, hopes must be pinned on equitable estoppel: a person who makes a negligent misrepresentation to another with the intention that that other shall act upon it, and with the consequence that that other does act upon it to his detriment, is bound to make the representation good, or pay compensation if this cannot be done. If *Cann* v. *Willson* [49] is no longer good law, *Slim* v. *Croucher* [50] must come to the rescue. Not everyone will be agreed with W. R. Anson [51] in thinking "the common law, as it stands, to be a monument of practical common sense," and there are those who will prefer "to contemplate rules of law through a golden haze of equitable possibilities."

[44] "Reliance upon Gratuitous Promises or Other Conduct," 64 *Harvard Law Review*, 913, at p. 921.

[45] "Liability for Negligent Language," 14 *Harvard Law Review*, 184; *Selected Essays on the Law of Torts*, 325.

[46] (1931) 255 N.Y.Rep. 170.

[47] [1951] 2 K.B. 164.

[48] [1932] A.C. 562.

[49] (1888) 39 Ch.D. 39.

[50] (1860) 1 De G. F. & J. 518. *Cf. Elkington & Co.* v. *Hürter* [1892] 2 Ch. 452, at p. 455, where Romer J. said: ". . . and since the case of *Low* v. *Bouverie* the plaintiffs could not base their claim in reliance upon the equity which was laid down in the case of *Slim* v. *Croucher*."

[51] "*Derry* v. *Peek* in the House of Lords," 6 L.Q.R. 72, at p. 74.

IV—Estoppel and Intention

Settled law has it that in order to operate by way of estoppel, a representation must be of fact, meaning not of law nor of intention.[52] Apparently, a person is not estopped from denying the truth of his representation as to the state of the law.[53] But there are doubts and distinctions with regard to statements of intention. If a man makes a statement as to his intention, and all the other elements of estoppel are present, he will not be allowed to deny that his intention was what he stated it to be. But the House of Lords have decided that estoppel will not operate in such a way as to compel him to carry out his stated intention.[54] It is in this connection that the *High Trees* cases must be considered. According to Mr. Wilson,[55] the first case in which the *High Trees* principle (which he calls "quasi-estoppel") was applied is *Hughes* v. *Metropolitan Ry.*,[56] and this is also the earliest case cited on the matter by Lord Justice Denning in his latest article.[57] There are, however, two other lines of cases which are relevant, even if not directly on the point. These are: (1) Cases where a genuine estoppel has operated in the release of an obligation; and (2) cases where the equitable defence of laches has been successful.

(1) *Estoppel and the Release of Obligations*

The eighteenth and nineteenth century cases appear to turn on the question of whether there was a representation by the plaintiff that he was releasing the obligation (estoppel),[58] or a representation by the plaintiff that he had no intention of enforcing the obligation (no estoppel).[59] It is clear that a mere statement of intention not to enforce an obligation does not by estoppel prevent its subsequent enforcement, notwithstanding that the obligor was intended to and did act upon that statement and altered his legal position in consequence.[60] It is equally clear that, under these cases, a statement that an obligation is released, if the obligor is intended to and does act upon it to his detriment, estops the obligee from denying the fact of the release, notwithstanding that what the obligee did was insufficient to effect a release in law.[61] It is difficult to see how

[52] *Cf.* L. F. Everest and E. Strode, *Law of Estoppel*, pp. 336–341.
[53] *Rashdall* v. *Ford* (1866) L.R. 2 Eq. 750; *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227; *Dean* v. *Bruce* [1951] 2 All E.R. 926.
[54] *Jorden* v. *Money* (1854) 5 H.L.C. 185.
[55] "Recent Developments in Estoppel," 67 L.Q.R. 330, at p. 334.
[56] (1877) 2 App.Cas. 439.
[57] "Recent Developments in the Doctrine of Consideration," 15 M.L.R. 1, at p. 4.
[58] *Wekett* v. *Raby* (1724) 2 Bro.P.C. 386; *Richards* v. *Syms* (1740) 2 Eq.Ca.Ab. 617, pl. 2; *Flower* v. *Marten* (1837) 2 My. & Cr. 459; *Major* v. *Major* (1852) 1 Drew. 165; *Yeomans* v. *Williams* (1865) L.R. 1 Eq. 184; *Re Applebee* [1891] 3 Ch. 422.
[59] *Byrn* v. *Godfrey* (1798) 4 Ves. 6; *Cross* v. *Sprigg* (1849) 6 Hare 552; *Peace* v. *Hains* (1853) 11 Hare 151; *Jorden* v. *Money* (1854) 5 H.L.C. 185; *Re Pink* [1912] 1 Ch. 498.
[60] *Jorden* v. *Money* (1854) 5 H.L.C. 185.
[61] *Major* v. *Major* (1852) 1 Drew. 165.

this proposition can have been affected by *Jorden* v. *Money*, where there was a mere statement of intention not to enforce. This distinction appears to be between a mere statement that the obligee will forbear to exercise what he continues to regard as a legal claim (which cannot estop him from denying that the claim has ceased to exist, as, by the very statement itself, the continued existence of the claim is assumed), and a statement by the obligee that he is renouncing his legal claim (a statement which is tantamount to " I have released my claim ").

These cases of release by estoppel were apparently decided on the same principle as that which was applied in *Fenner* v. *Blake*,[62] which was treated by the Divisional Court as one of estoppel, and not as one of a representation of intention. Similarly, *Salisbury* v. *Gilmore* [63] proceeded on the basis that what was in form a representation of intention was in substance a statement of fact. Again, the principle is adequate to support *Foster* v. *Robinson*.[64] Lord Justice Denning, in his article in 15 *Modern Law Review*, deals extensively with the question whether the plaintiff's promise in that case was binding. The actual issue in the case could be decided independently of any decision on that point. The tenant's statement was in substance one that he occupied under a licence, and he was estopped from denying that because the plaintiff had allowed him to live rent free on the premises. Evershed M.R. said (at p. 155): " The fact that the doctrine of estoppel really forms the foundation in such a case as this of the alleged surrender by operation of law is, I think, clear from the judgment of Chitty J. in *Wallis* v. *Hands*." [65]

(2) *Estoppel and Laches*

Laches is a term which has caused much confusion on account of the obscurity of the relationship between lapse of time and acquiescence. *Laches* has, according to J. Brunyate,[66] a wide sense, " including all the rules under which lapse of time before a suit is brought can operate as a defence, but the word also has a narrow sense in which it is distinguished from acquiescence. Laches in the wide sense includes both laches in the narrow sense and acquiescence. Lapse of time can operate in two ways; it may be an element in a more general defence or it may be a defence in itself."

Only one case [67] appears to exist where lapse of time operates as a defence in itself. While the time has been lapsing, some event

[62] [1900] 1 Q.B. 426.
[63] [1942] 2 K.B. 38.
[64] [1951] 1 K.B. 149.
[65] [1893] 2 Ch. 75.
[66] *Limitation of Actions in Equity*, p. 188. *Cf.* H. G. Hanbury, *Modern Equity*, 5th ed., p. 55; H. T. Banning, *Law of the Limitation of Actions*, 3rd ed., p. 229.
[67] Apart from those to which a statutory period of limitation is applicable.

may have occurred, such as the death of witnesses, which makes it impossible or very difficult for the opponent to prove his case. Here the lapse of time may bar the claim; indeed, it is with the same circumstances in view that statutes of limitation are enacted, and the equitable rule is an analogous development. Hence, the period which must elapse in order to bar a claim in equity must be at least as long as the period of limitation which would have applied to the matter had the action been at common law.[68] All that this amounts to is equity following the law, with the one difference that the period is not fixed; only a minimum period is provided for.

Other examples of lapse of time operating as a defence in itself are given by Brunyate, but it is submitted that they are not true cases, being merely examples of lapse of time providing evidence of some other defence. Thus, he mentions the case of applications for speedy remedies: lapse of time will bar a claim for, *e.g.*, an interlocutory injunction.[69] Lapse of time in this case, however, is not a defence in itself, but is the strongest evidence that the matter is not one of urgency, and therefore that the case, irrespective of any lapse of time, is not one in which an interlocutory injunction could have been granted.

Acquiescence was regarded by Black J., as he then was, in *McCausland* v. *Young*,[70] as the acceptance by the plaintiff of the *status quo*, the defendant acting in reliance upon that acceptance and doing such consequential acts as to make it inequitable that he should be asked to undo it all in order to satisfy the plaintiff's claim.[71] *McCausland* v. *Young* was taken [72] to the Court of Appeal of Northern Ireland, where it was heard by two judges, who did not agree on the point of acquiescence. As the case is something of a *cause célèbre*, it is worth while to examine the judgments in detail with regard to that matter.

Sir James Andrews, the late Lord Chief Justice of Northern Ireland, used these words (at pp. 88–89): "What, then, is the law of acquiescence and laches? Acquiescence may arise whilst an infringement of legal rights is actually taking place, or it may result from the failure to seek redress or remedy when a violation of his rights, unknown to a party at the time, is brought to his notice. It is acquiescence in this second sense which is relied upon in the present case—an element in laches operating by way of estoppel. The principle underlying the doctrine of laches, as I understand it, is that in a court of equity, assuming there to be no statutory bar, a person is bound to prosecute his claim with reasonable diligence and without undue delay. The mere assertion of a claim will not

[68] *Archbold* v. *Scully* (1861) 9 H.L.C. 360.
[69] *Clarke and Chapman* v. *Hart* (1858) 6 H.L.C. 633.
[70] [1948] N.Ir. 72, at pp. 100–112.
[71] See also *Smith* v. *Clay* (1767) 3 Bro.C.C. 639n; *Blake* v. *Gale* (1886) 32 Ch.D. 571, at p. 581; *Allcard* v. *Skinner* (1887) 36 Ch.D. 145, at pp. 186–187; *Rochefoucald* v. *Boustead* [1897] 1 Ch. 196, at p. 211.
[72] [1949] N.Ir. 49.

suffice. The special circumstances of each case must, of course, be considered, especially the plaintiff's acquiescence as a free agent after he has acquired knowledge of the facts and of his rights. A change in the position of the party alleging acquiescence as a consequence of the other party's conduct is always a most material and relevant circumstance." Babington L.J. (at pp. 106–107) drew the same distinction between acquiescence during and after an act. He reviewed the authorities, and then went on to say (at p. 108) that the answer to the plaintiff's claim to avoid a forfeiture clause in a resettlement " must be either that he has by his acts shown ' a fixed deliberate and unbiassed determination ' to abide by it, or that he has so dealt with the property as to make it impossible for the court to grant him relief."

Perhaps, therefore, acquiescence in a *fait accompli* is based on estoppel. Certainly, before he is barred by acquiescence, a plaintiff must know all the facts.[73] Again, it would seem that there is a distinction between conduct amounting to a representation that the claim is abandoned (acquiescence),[74] and a mere statement of intention not to sue (no acquiescence).[75] But evidently it is not essential to the defence of acquiescence that the person setting it up should have acted on it to his detriment; also, it appears that the longer the lapse of time since the acquiescence began, the better the chance the defence has of succeeding. And it is said that the defence of acquiescence cannot be pleaded where a statutory period of limitation is applicable. In *McCausland* v. *Young* (*ante*), Andrews C.J.'s statement that " A change in the position of the party alleging acquiescence as a consequence of the other party's conduct is always a most material and relevant circumstance " implies that it is not an essential requirement. Similarly, in *Lindsay Petroleum Co.* v. *Hurd*,[76] Lord Selborne said: " Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval. . . ." It is submitted that the length of the delay is important only to the extent to which it helps to answer the question, " Has the plaintiff by his acts shown a fixed deliberate and unbiased determination to abide by the *status quo*?"

It is obvious that lapse of time as a defence in itself must be confined to those claims in equity which are not provided for by any statute of limitations. And herein, apparently, also lies a distinction between the defences of acquiescence and estoppel. Estoppel differs from acquiescence in requiring as an essential element that the person relying on it should have changed his position on the faith of the plaintiff's conduct, while in acquiescence

[73] *Life Association of Scotland* v. *Siddal* (1861) 3 De G.F. & J. 58, at p. 74.
[74] *McCausland* v. *Young* [1949] N.Ir. 49, at p. 108, *per* Babington L.J.
[75] *De Bussche* v. *Alt* (1878) 8 Ch.D. 286, at p. 314, *per* Thesiger L.J.
[76] (1874) L.R. 5 P.C. 221, at p. 240. And see *G.W.R. Co.* v. *Oxford, Worcester and Wolverhampton Ry.* (1853) 3 De G.M. & G. 341.

this is but one factor to be taken into account. Estoppel is a defence to any legal or equitable claim, while acquiescence in this sense is confined to equitable claims not covered by a statutory period of limitation.

There is a sense in which the term *acquiescence* is used to denote a defence to a claim at law, as well as to one in equity, but it is submitted that that is an example of estoppel properly so called. This meaning of acquiescence was considered by Fry J. in *Willmott* v. *Barber*,[77] where he said: "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff [seeking to rely on the acquiescence] must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

The High Trees Cases

Lord Justice Denning has in more than one place[78] stated the principle of these cases to be that a promise is binding [at least for the purpose of being set up as a defence] if deliberately made, intended to be binding, intended to be acted upon, and in fact acted on. This statement involves several points of interest: a promise is not a statement of fact; no detriment to the defendant is required; and no consideration is required to move from the promisee. The defence is said to derive from equity, but to apply to legal claims as well. It is not estoppel, contract, or

[77] (1880) 15 Ch.D. 96, at pp. 105–106. And see *Morrell* v. *Studd and Millington* [1913] 2 Ch. 648.

[78] *e.g.*, in *Wallis* v. *Semark* [1951] 2 T.L.R. 222, at p. 226

acquiescence. Mr. Wilson, in 67 *Law Quarterly Review*, refers to the principle as "quasi-estoppel," and says (at p. 333): "Quasi-estoppel is available when an unambiguous representation of intention is made, which is intended to be acted upon and is, in fact, acted upon by the party to whom it is made, with the result that on the faith of it he prejudices his position in relation to the representor." Mr. Wilson thus differs from Lord Justice Denning in importing from traditional estoppel the requirement of detriment to the person pleading "quasi-estoppel." It is difficult to reconcile either of these propositions with *Jorden* v. *Money*. Indeed, Lord Justice Denning recognises this, for he has said [79] in answer that the law has not been standing still since 1854.

In *Hughes* v. *Metropolitan Ry.*[80] Lord Cairns said: "It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." For the purposes of that case, the principle could be stated in more easily recognisable terms: a person will not be allowed to profit by his own fraud; and it would clearly be fraudulent for one party to a contract (in so many words or not) to give the other permission to commit a breach and then turn round and sue him for it. It is not that the whole transaction is fraudulent, but the conduct of the plaintiff becomes fraudulent when he attempts to go back on the position he himself has caused to exist.[81] No such consideration entered into *Jorden* v. *Money*.

Birmingham and District Land Co. v. *L. N. W. Ry.*[82] carries the principle two stages further. First, an assignee may not enforce an obligation of which the assignor has authorised a breach. Were it otherwise, the combined actions of assignor and assignee would be just as much a fraud on the other party. Secondly, a party to an obligation who authorises the other to commit a breach of it may enforce that obligation if he places the other party in the same position as he was before the breach was authorised. Naturally, if the position of the parties is so adjusted, no question arises of profiting from fraud.

[79] [1947] K.B. 134.
[80] (1877) 2 App.Cas. 439, at p. 448.
[81] *Cf. Harrison* v. *Gardner* (1817) 2 Madd. 198; *Bannister* v. *Bannister* [1948] 2 All E.R. 133; and the cases on secret trusts and the doctrine of part performance, among other such manifestations of the equitable attitude to turning a rightful transaction into a fraud.
[82] (1888) 40 Ch.D. 268.

Panoutsos v. *Raymond Hadley Corporation of New York* [83] differs from the other cases in that the breach was of a condition precedent and not of a promise, and was waived, not authorised. Viscount Reading C.J. said (at p. 477): "It is open to a party to a contract to waive a condition which is inserted for his benefit." He went on (at p. 478) to quote with approval a question put by Bowen L.J. in *Bentsen* v. *Taylor, Sons & Co.*[84]: ". . . did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent . . . ?" The same rules apply to waiver by a landlord of forfeiture of a lease. "The two essentials for waiver are: (1) that the landlord should be aware of the commission of an act of forfeiture by the tenant, and (2) that he should do some positive act which is a recognition of the continuance of the tenancy." [85] This principle is much older than *Hughes* v. *Metropolitan Ry.*

Buttery v. *Pickard* [86] is admirably treated by Mr. Wilson in his article in 67 *Law Quarterly Review*, and the case appears as reported to be authority for nothing at all. It is now possible to pass in chronological order to *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*[87] In that case there was a parol agreement to reduce the rent due under a lease, there being no consideration to support the variation. Although the efficacy of this agreement was not in issue, Denning J., as he then was, held obiter that it was binding. This was expressly not on the basis of estoppel, but because (at p. 134) "a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on." Among the authorities said to be followed were *Fenner* v. *Blake*, *Buttery* v. *Pickard*, *Hughes* v. *Metropolitan Ry.*, *Birmingham and District Land Co.* v. *L. N. W. Ry.* and *Salisbury* v. *Gilmore*. A few observations must be made:—

(1) *Jorden* v. *Money* could be and was distinguished (at p. 134) "because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound." This, it is submitted, is to go back to the distinction drawn [88] in the

[83] [1917] 2 K.B. 473.
[84] [1893] 2 Q.B. 274, at p. 283.
[85] G. C. Cheshire, *Modern Law of Real Property*, 6th ed., p. 184. And see *Gibbon* v. *Payne* (1907) 23 T.L.R. 250.
[86] (1946) 62 T.L.R. 241.
[87] [1947] K.B. 130. And see R. E. Megarry's note in 63 L.Q.R. 278; G. C. Cheshire and C. H. S. Fifoot, "Central London Property Trust, Ltd. *v.* High Trees House, Ltd.", 63 L.Q.R. 283; and further notes by Messrs. R. E. Megarry and J. H. C. Morris and another learned contributor, 64 L.Q.R. 28–33, 193–195.
[88] See p. 332, *ante*.

cases on estoppel and the release of obligations: if there was a representation by the plaintiff that he was releasing the obligation there is an estoppel, but if the representation was merely that he had no intention of enforcing the obligation no estoppel results. In the *High Trees Case* the fact that the release was only partial seems immaterial here.

(2) The fact that the release was but partial does, however, bring the case into collision with the rule in *Pinnel's Case*,[89] embodied in the decision of the House of Lords in *Foakes* v. *Beer*.[90] The distinction appears to be that same one between an intention not to enforce and intention to affect legal relations, *i.e.*, to effect an immediate partial release.

(3) The defendants in the *High Trees Case* had not acted to their detriment in reliance on the release. Mr. Wilson in 67 *Law Quarterly Review* tries hard to find a detriment, but Lord Justice Denning in 15 *Modern Law Review* accepts that there was none. Indeed, it does not appear that they acted in any way in which they were not already bound to act. That means that the case could not be one of estoppel properly so called. There was no question of it being a case of legal variation of the lease, for the agreement was neither under seal nor for consideration.[91] Nor could it be said that in seeking to disregard the agreement the landlords were guilty of fraud, for, in asking for the full rent, the landlords were putting the tenants back in the position they previously occupied, so bringing themselves within the conditions laid down for a successful plaintiff in *Birmingham and District Land Co.* v. *L. N. W. Ry.* And it was not a case of acquiescence. Furthermore, the fact that the defendants did not act on the agreement to their detriment means that the facts of the case do not support the learned judge's dictum (at p. 134). Thus, to sum up, *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, so far as it was there decided that the agreement was binding, does not follow any of the authorities cited in the case. The dicta to that effect are either wrong, or foreshadow the creation of a new principle, that a promise intended to be binding is binding, at least where it is a promise to forgo a benefit under an existing obligation. It remains to be seen whether any of the subsequent cases support such a proposition.

It is difficult to see why *Robertson* v. *Minister of Pensions*[92] was regarded by Denning J., when he decided it, as a *High Trees* case, yet he adheres to that view in 15 *Modern Law Review*, and it is accepted by Mr. Wilson in 67 *Law Quarterly Review*. There was no question of release or variation of a consensual obligation

[89] (1602) 5 Rep. 117a.
[90] (1884) 9 App.Cas. 605.
[91] *Cf. Scott* v. *Midland G.W. Ry.* (1852) 3 I.C.L.R. 59, at p. 64.
[92] [1949] 1 K.B. 227.

between the parties; there was a representation of fact, intended to be acted upon and in fact acted upon by the person to whom it was made, to his detriment. It was apparently a good old-fashioned case of estoppel—estoppel even at common law, for there was a cause of action apart from the estoppel, which was used merely to prove an existing claim.

In *Mitas* v. *Hyams*,[93] there was an oral agreement to alter the dates on which rent was payable under a lease under seal. Although treated as a *High Trees* case, it appears to have been more akin to *Berry* v. *Berry*.[94] In return for his landlord's release from the obligation to pay rent on the dates specified in the lease, the tenant promised to pay rent on the usual quarter days: a variation for consideration. Indeed, this explanation makes it a great deal easier to understand why the variation was held to be effective only if evidenced in writing or supported by acts of part performance.

The last case it is proposed to examine in this context is *Wallis* v. *Semark*.[95] In that case a rent book stated that a tenancy was subject to "one month's notice each party." That term was subsequently altered by the landlord's duly authorised agent to "one month's notice from tenant, two years' notice from landlord." It was held that the tenant was entitled to two years' notice. Once again, this could not be a case of estoppel, as the tenant had not altered his legal position in reliance on the variation, and for the same reason it could not come within the principle of *Hughes* v. *Metropolitan Ry.* Again, there was no question of there being a contractual variation of the lease, nor was it a case of acquiescence. Denning L.J. (at p. 226) relied on his dictum in the *High Trees Case*, but referred to a promise "intended to be acted on and in fact acted on." It was not in fact a promise which altered the course of the tenant's actions, and one must say again that that part of the judgment is unsupported. Perhaps, then, this case can be regarded as some authority for the proposition that a promise intended to be binding is binding, at least where it is a promise to forgo a benefit under an existing obligation.

Summary of Submissions

I. While a statement by an obligee that he does not intend to enforce an obligation can never give rise to an estoppel, a representation that an obligation is there and then released, being a representation of fact, can operate by way of estoppel. It is uncertain whether this applies to a partial release. There is an estoppel only where there is a statement of fact, intended to be acted upon by the person to whom it is made, and in fact acted upon by that person to his detriment.

[93] [1951] 2 T.L.R. 1215.
[94] [1929] 2 K.B. 316.
[95] [1951] 2 T.L.R. 222.

II. Distinct from release by estoppel are certain other types of release: (1) An act or declaration creating an immediate discharge which the debtor can plead at law as a release or as accord and satisfaction.[96] (2) A discharge, which, though not immediate and absolute, becomes perfect by a condition having, in the event, been performed.[97] (3) The case where the creditor intends to discharge the obligation at his death, and communicates that intention to those who would, under his own disposition, take or represent his interest upon his death, and relies upon their fulfilment of his intention.[98] (4) The case where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one *in loco parentis*, or is part of a family arrangement.[99]

III. The equitable defence of acquiescence, which applies only in the absence of a statute of limitations, consists of showing a fixed deliberate determination by the plaintiff to abide by the *status quo*, making it inequitable, in the circumstances of the case, for him to seek to alter it.

IV. There is a defence of acquiescence applicable to claims at law (and also to claims in equity). This can be set up by a defendant who, ignorant as to his legal rights, has been encouraged by the plaintiff, who was aware of his own legal rights, and of the defendant's error, to do some act. This is a manifestation of the general principle of estoppel.

V. If a party to an obligation expressly gives permission to the obligor to commit a breach of it, or by his conduct reasonably induces the obligor to believe that such permission has been granted, he cannot subsequently enforce that obligation (except to the extent to which his permission was not applicable) without first putting the obligor in the position he occupied before the granting of the permission.

VI. A party to an obligation may waive a breach of a condition (as opposed to a promise) inserted for his benefit.

VII. *Wallis* v. *Semark* and the dicta in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, can be supported only on the basis that a promise to forgo a benefit under an existing obligation, if intended to be binding, is binding, without further requirements (or some wider principle embracing this proposition). There appears to be no further authority for that, except, possibly, *Buttery* v. *Pickard*. Moreover, it is questionable whether such a principle is desirable. In the *High Trees Case*, by an accident of fortune, the original bargain turned out a temporary hardship for the tenants. This being insufficient to frustrate the obligation, the

[96] *Reeves* v. *Brymer* (1801) 6 Ves. 516.
[97] *Aston* v. *Pye* (1788) 5 Ves. 354.
[98] *Wekett* v. *Raby* (1724) 2 Bro.P.C. 386. This is the secret trusts principle: see *Byrn* v. *Godfrey* (1798) 4 Ves. 6, at p. 10, *per* Lord Loughborough.
[99] *Foster* v. *Dawber* (1851) 6 Ex. 839. Here, in other words, there never was an obligation. See also *Peace* v. *Hains* (1853) 11 Hare 151, at pp. 155–156, *per* Page Wood V.-C.

landlords were entitled to insist on its full performance. If, in kindness, they promised to be content with half the amount due under the original agreement, thereby making it a temporary hardship for themselves instead of their tenants, and they neither received anything in exchange nor prejudiced the position of the tenants, the effect of holding their promise binding would be either to convert into contract a bare promise to give, or to make every such statement unretractable, according as the case is regarded as one of assumpsit or estoppel. The doctrine of consideration has been subjected to much relevant criticism, but it can scarcely be suggested that the law should enforce bare proffers of kindly help in times of adversity. Were there such a principle, however, that a promise intended to be binding binds, then it is doubtful whether any valid distinction can be drawn between a promise to forgo a benefit due and other types of promise. *Combe* v. *Combe* [1] does not assist in this speculation, for it does not appear that the promise in that case was intended to be binding. Entirely different factors, however, enter into the matter in respect of ordinary commercial dealings. If such a principle does come to be developed in the future, it is suggested that it should apply only to ordinary commercial transactions and cases where the most convincing evidence of intention to be legally bound is adduced. The most convenient regulation of commercial relations is one of the chief aims of this branch of the law, and the golden haze of equitable possibilities through which rules of law may be contemplated must not be allowed to obscure this object by its density.

L. A. Sheridan.[2]

[1] [1951] 1 All E.R. 767. *Cf. Perrott (J. F.) & Co., Ltd.* v. *Cohen* [1951] 1 K.B. 705, at pp. 709–711, *per* Denning L.J.

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STATUTES

The Income Tax Act, 1952

The new Income Tax Act represents the most substantial and, certainly to the lawyer and accountant, by far the most valuable work of consolidation undertaken in the post-war spring-cleaning of the Statute-book. It does not attempt to codify the law of income tax; one would like to think that that may be attempted one day, but clearly the time is not ripe while a Royal Commission is sitting to review the law. In the meantime, the Herculean labour undertaken by the draftsmen of this Act is an essential preliminary to codification and one which in itself will materially lighten the task of all those (including the Commission) who have to try to find a path through the existing labyrinth.

The new Act consolidates and repeals the Act of 1918 and the income tax provisions of some 50 subsequent statutes. Every effort has been made to leave the letter of the law exactly as it was, and not to correct ambiguities or anomalies or to make amendments in the light of judicial interpretation. On the other hand, all statutory amendments, express or implied, have been incorporated, the wording has sometimes been improved where this could be done without risking altering the legal effect, and the whole of the resulting material has been rearranged in a far more logical and convenient order than hitherto.

It is in the last respect that the changes are most significant and valuable. In the 1918 Act much important material was to be found, with difficulty, in the time-honoured Schedules A–E appended to the Act and in their special and general rules. These now disappear as such. The nomenclature of Schedules A–E is retained for assessment purposes (it could hardly have been abolished outright without changing the law) but the so-called Schedules cease to be Schedules in fact, and the general and special rules become sections of the Act grouped under the appropriate heads of assessment.

This major improvement in lay-out, coupled with the grouping of all relevant provisions in their appropriate context, has unquestionably produced immense improvements in intelligibility. The Act is an instructive illustration of how much can be achieved by way of consolidation and rearrangement without change of substance. Indeed, not only is it a triumph of drafting technique in itself, but also to some extent a retrospective justification of the past labours of the much-maligned draftsmen of Finance Acts. Stripped of cross-references and placed in the appropriate context, provisions which hitherto seemed incomprehensible or clumsy now appear almost as models of clarity and precision. This is not to

say that the task of the tax-adviser has become simple; apart from the voluminous case-law, the new Act has 532 sections and 25 Schedules. Still, it is less difficult than it was.

If only the Act can be constantly revised and not allowed to become overlaid by succeeding Finance Acts, we may claim to have taken a big step forward towards legislative slum clearance. Other slums remain of course. In the same neighbourhood there are the death duty provisions buried in annual legislation dating back to 1894 and earlier. In a different field there are the Rent Acts—but consolidation alone cannot do much with them, they demand a brand new structure not based on a standard rent dependent on the (probably unknown) position in 1914 or 1939. But it is reassuring to know that it has at last been actively recognised that the form of legislation is almost as important as its content and that clearing dead wood is vital to new growth, and that these essential tasks are in such skilled hands.

L. C. B. G.

NOTES OF CASES

Criminal Attempts

Surprisingly few cases on attempts to commit a crime engage the attention of the Court of Criminal Appeal. If it be thought that this phenomenon is due to the certainty of the law, at least one of the recent cases on the subject, *R.* v. *Whybrow* (1951) 35 Cr.App.R. 141 and *R.* v. *Moran* [1952] 1 All E.R. 803, will help to dispel any such misconception. The true importance of these cases lies not so much in the guidance which the former contributes to the question of *mens rea* in attempts as in the attention which both cases draw to the comparatively undiscussed problem of what crimes is it impossible to attempt to commit. Discussion therefore may conveniently be divided into two questions.

1. *What is the mens rea required in criminal attempts?*

Normally this presents no difficulty in that the same *mens rea* is required for an attempt as for the complete offence. It is only where the law recognises the doctrine of constructive *mens rea* that the danger of confusion arises, as can be seen in *R.* v. *Whybrow*. In that case the trial judge had directed the jury that they must find the prisoner guilty of attempted murder if they were of the opinion that his intention was to cause the death of his wife or to inflict grievous bodily harm on her. As a direction in a case of murder this statement of the law met with the full approval of the Court of Criminal Appeal, but as a direction in a case of attempted murder it was wrong, for in such a case the intent becomes the principal ingredient of the crime and nothing short of an actual intent to kill must be proved.[1] In other words, the doctrine of constructive malice has no place in attempted murder.

Where criticism is voiced against the notion of constructive murder it is principally directed to cases of killing in the course of committing a felony of violence, but it should be pointed out that killing in pursuance of an intent to do grievous bodily harm is no less an instance of constructive murder. It may, of course, be argued that in every case where the accused forms an intent to do grievous bodily harm there exists sufficient proof of his realisation and

[1] Comparison may be made with *R.* v. *Cruse* (1838) 8 C. & P. 541 and *R.* v. *Bourdon* (1847) 2 Car. & Kir. 366. In *Cruse*, where the charge was one of inflicting an injury dangerous to life with intent to murder (under 1 Vict. c. 85, s. 2) Patteson J. said to the jury: "Before you can find the prisoner guilty of this felony you must be satisfied that when he inflicted this violence . . . he had in mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued that will not be sufficient, unless he actually intended to commit murder." See too 1 Bishop, *Criminal Law*, 8th ed. (1892), §§ 730 and 736, citing several U.S. cases in which this principle was followed.

recklessness that death might result.[2] This principle was embodied in Avory J.'s direction to the jury in *R.* v. *Lumley* (1911) 22 Cox 635, where it would seem that the judge's intention was to equate the phrase "grievous bodily harm" with the words "any act known to be dangerous to life," introduced by Stephen J. in *R.* v. *Serné* (1887) 16 Cox 311 to alleviate the harshness of the old rule which declared every killing in the course of committing a felony to be murder. No cause for concern exists if that be the meaning of grievous bodily harm. However, in the recent murder case of *R.* v. *Bloom* (1952), The Times, February 7, Hallett J., in explaining the nature of grievous bodily harm to the jury, relied instead on the definition "any injury which seriously interferes with the health or comfort of the person injured,"[3] which is the test used when charges are brought under the Offences against the Person Act, 1861. In extending this definition into the field of constructive murder Hallett J. has initiated what, it is suggested, is a dangerous principle, for it requires little imagination to conceive of cases where the injury inflicted, although it seriously interferes with the victim's comfort, is neither dangerous to life nor indicative of the accused having foreseen the possibility of death.

2. *What crimes is it impossible to attempt to commit?*

Up until the end of the last century it was thought that no criminal liability attached to a person who attempted to do that which in fact it was physically impossible to perform. Then came the decisions in *R.* v. *Brown* (1890) 24 Q.B.D. 357, and *R.* v. *Ring* (1892) 17 Cox 491, which laid down the modern principle that impossibility in itself is no defence to a charge of attempted crime. What those cases did not decide or discuss was whether there exist certain crimes which the law regards as impossible to attempt under any circumstances. This question has now been brought to the fore by *R.* v. *Moran*, in which the Court of Criminal Appeal ruled that there is no such crime as an attempt to demand money with menaces within section 30 of the Larceny Act, 1916.[4] According to Lord

[2] See *Russell on Crime*, 10th ed., Vol. 1, p. 543, n. 69a.

[3] *Per* Willes, J., in *R.* v. *Ashman* (1858) 1 F. & F. 88, who also held that it is not necessary that grievous bodily harm should either be permanent or dangerous. *Cf. R.* v. *Thomas* [1949] 2 All E.R. 662, at p. 670 (charge of murder to which the accused pleaded *autrefois convict*) in which the trial judge, Devlin J., appears to have adopted the prosecution's interpretation of grievous bodily harm as signifying "at least terrible injury" to the victim.

[4] The only report of *R.* v. *Moran* so far available is most unsatisfactory. Reference to the transcript of the judgment in the C.C.A. reveals several odd facts. (1) The trial judge, Croom-Johnson J., said in relation to the charge under s. 30: "The crime is constituted by the demand for the money with menaces and *without any reasonable cause.*" Of course, the defence of reasonable cause applies only to a charge under s. 29 (1) and has no application to a charge under s. 30. (2) The jury returned a verdict of attempted robbery, when the indictment contained no count for robbery. The C.C.A. thought that the learned judge probably had robbery in his mind when directing the jury. It seems more likely that he confused s. 30 with both robbery and the offence under s. 29 (1). (3) Although the facts as stated appear to fulfil the requirements of

Goddard C.J., who delivered the unanimous judgment of the court: "A man may form the intention of demanding money by menaces and then not put his intention into practice. Then he would not be guilty of demanding. But the court cannot see how you are guilty of an attempt to demand: you either demand or you do not."

If this view is correct there can be no half-way house in the crime of demanding with menaces between preparation, which is never punishable, and the completed offence. What then is the position where a person suffering from an impediment of speech begins to threaten X with violence unless he hands over a sum of money but before he can communicate his demand X moves away undisturbed? Suppose again that two confederates A and B agree to hold up X and that A, relenting of their common purpose, puts his hand over B's mouth as B begins to speak. Yet another example might arise where a person decides to communicate his demands impersonally by means of a loudspeaker concealed in X's house, but due to some technical defect the loudspeaker fails to function. Is it to be said in each of the above examples that until the proposed demand is in fact communicated to the intended victim the accused's conduct is still in the stage of preparation, to which no guilt attaches?

The decision in *R.* v. *Moran* leads us to consider whether there are any other crimes which it is impossible to attempt to commit. There is a complete absence of authority on this question and a strange dearth of discussion even among the leading textbooks, not a word being said on the subject in either *Russell*, *Archbold* or *Kenny*. The only writer to advert to the problem is Sir Fitzjames Stephen who, in his *History of the Criminal Law* (Vol. 2, p. 227), suggests that "a man could hardly attempt to commit perjury or riot or libel or to offer bad money or to commit an assault, for an attempt to strike is an actual assault." To these crimes Stephen adds treason by imagining the King's death, explaining that an overt act done with intent to commit treason would in itself constitute treason. Beyond this tentative list there is no guide, but it will be noticed that common to all the crimes listed by Stephen is the implied suggestion that since in those cases the *actus reus* for the attempt must coincide with the *actus reus* for the complete offence, it becomes in law impossible to commit an attempt. This reasoning would not apply to manslaughter and yet, having regard to the

demanding with menaces, it is suggested that the conduct of the accused did not amount to a sufficient "menace" within the meaning of s. 30. Had the conviction been dismissed on this ground it would have been quite understandable. It is noticeable that the prosecutor's reaction to the accused's threat: "I want some money and if not you have had it," was to square up to him, whereupon the accused went away. There is at least strong evidence here that the threat was "not calculated to deprive any person of reasonably sound and ordinarily firm mind of the free and voluntary action of his mind" within the test laid down in *R.* v. *Boyle* [1914] 3 K.B. 339. *Cf. R.* v. *Walton* (1863) L. & C. 288, at p. 298, in which the effect on the mind of the prosecutor himself was held to be the governing test.

views expressed in *R.* v. *Whybrow* on the nature of *mens rea* in attempts, it may seriously be doubted whether there exists such a crime as attempted manslaughter.[5]

We have already seen that to sustain a charge of attempted murder there must be proof of actual malice, *i.e.*, a specific intent to kill; constructive malice, though sufficient for murder, cannot be invoked in cases of attempted murder. Involuntary manslaughter, on the other hand, is essentially a crime which does not require a specific intent and where the *mens rea* is entirely constructive. Thus, it may be committed where death results from the doing of an unlawful act which is likely to injure another person [see *R.* v. *Larkin* [1943] K.B. 174] or where the conduct of the accused amounts to a very high degree of negligence generally described as recklessness [see *R.* v. *Bateman* (1925) 19 Cr.App.R. 8 at p. 11; *Andrews* v. *D.P.P.* [1937] A.C. 576, at p. 583; and *cf. The People* v. *Dunleavy* [1948] Ir.R. 95]. The question of attempted manslaughter would arise directly in circumstances where the accused's conduct is such as to amount to recklessness of human life but where, fortuitously, no loss of life results. Take the following example. A motorist, showing complete disregard for the life of other users of the road, drives at 50 m.p.h. down a crowded thoroughfare and strikes a pedestrian outside the entrance to a hospital. The injury inflicted would normally have resulted in death through severe hæmorrhage, but by prompt medical attention the pedestrian survives. Had the pedestrian died the motorist would have been liable for manslaughter since he had the necessary *mens rea*—recklessness—for the completed crime. Where death does not result there is no change in the *mens rea*, only the *actus reus* is altered, and in the example above the accused's conduct cannot go any further, so that apparently all the ingredients of an attempted manslaughter are fulfilled. The fallacy of this reasoning is the acceptance of constructive *mens rea* as sufficient for a charge of attempt. In *R.* v. *Whybrow* the Court of Criminal Appeal unhesitatingly rejected constructive *mens rea* in a charge of attempted murder. Should the question ever come before the court it may confidently be predicted that a similar ruling would be given in relation to attempted manslaughter, thus acknowledging manslaughter to be a crime which it is impossible to attempt to commit.

J. Ll. J. Edwards.

Murder—Proof of Corpus Delicti

In *R.* v. *Horry* [1952] N.Z.L.R. 111, an appeal under section 3 (*a*) of the Criminal Appeal Act, 1945, against the conviction of Cecil

[5] There is a brief discussion of the question by Sayre: "Criminal Attempts," (1928) 41 Harv.L.R. 821 at p. 842, n. 73.

Horry for the murder of Mary Eileen Turner was heard by the New Zealand Court of Appeal on October 1, 2 and 3, 1951. Judgment was delivered on December 10, 1951. The appeal is of unusual interest in that the jury found Horry guilty of murder although the body of his victim had not been found. The appellant appealed on the ground, inter alia, that the learned judge directed the jury erroneously in summing up, in that he declined to direct the jury that, where no body or part of a body has been found which is proved to be that of the person alleged to have been killed, an accused person should not be convicted of murder or manslaughter, unless there is evidence either of the killing or of the death of the person alleged to be killed.

The submission of the appellant's counsel may be summarised as follows:—

(a) That, in a trial for murder, it is essential to prove that the crime had been committed and the identity of the murderer.

(b) That there was no satisfactory proof that murder had been committed because

(i) no body or part of a body had been produced;

(ii) there was no direct evidence that the victim had been killed;

(iii) there was no clear and unequivocal confession of the murder by the appellant.

Counsel submitted that the existing authorities demonstrated that where an accused had been convicted of murder without production of the body or part of the body of his victim there had been either direct evidence of the crime or a confession by the accused. In the present case he submitted that as the evidence that the accused had murdered Eileen Turner was wholly circumstantial (a view with which the court, at p. 116, agreed) there was not sufficient proof of death.

The judgment of the court, delivered by Gresson J., sets out the more important facts and circumstances brought out in evidence. It was proved that the appellant married Eileen Turner on Saturday, July 11, 1942. The day before the wedding she had drawn out over £300 from her savings bank and on the day of her wedding she received a cheque for £687 6s. 8d., being the proceeds from the sale of a house. On Sunday morning, July 12, at about 11 a.m. the married couple called on a friend and Eileen Turner was not seen again. On July 14, 1942, the appellant under an assumed name opened a bank account into which £80 in cash and the cheque for £687 6s. 8d. were paid. A fortnight later the account was closed. On June 26, 1943, during an interview with two police officers the appellant offered an explanation for the disappearance of Eileen Turner. He said that the marriage was arranged so that she might go off with another man and that for his co-operation he received £650. When questioned again by the police in June, 1951, in

answer to a question by his wife as to whether Eileen Turner had turned up he replied: "That's impossible; she couldn't have."

Gresson J. stated at p. 121:

> "The most material of the grounds upon which the appeal against conviction was based was that there was no sufficient evidence of the death of Eileen. It was not denied that, if the evidence could be regarded as sufficient to establish that she had been murdered, there was ample evidence that it had been done by the appellant; and it was conceded that the evidence could be used for the double purpose of proving both the factum of the murder and who was its author. But it was strenuously contended that the evidence was insufficient to establish the *corpus delicti* itself."

After examining the authorities he stated at p. 121:

> "In this case there is nothing in the shape of a confession, nor is there any sort of trace of a body. There does not appear to be any case in which, without any evidence of a body, or traces of a body, or violence used to a body, or of anything approximating to a confession, the factum of the murder has been held to have been sufficiently proved by circumstantial evidence. In the absence of any authority exactly in point, the approach must be to determine the governing principle and to apply it to the somewhat unusual facts of this case."

At p. 123 the learned judge pointed out that

> "In this case, there is neither the body nor traces of the body, nor anything in the form of a confession, but, in our opinion, that does not exhaust the possibilities. There may be other facts so incriminating and so incapable of any reasonable explanation as to be incompatible with any hypothesis other than murder. It is in accord both with principle and with authority that the fact of death should be provable by such circumstances as render it morally certain and leave no ground for reasonable doubt—that the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

The learned judge at p. 124 drew attention to the "formidable array of circumstances leading irresistibly to [the] conclusion" that Eileen Turner was dead.

> "In our opinion, it was competent for the jury to infer the fact of death from the whole of the evidence as a matter of moral certainty leaving no ground for reasonable doubt."

At p. 125 he said:

> "A jury viewing the evidence as a whole was, in our opinion, entitled to regard the concurrence of so many separate facts and circumstances—themselves established beyond all doubt, and all pointing to the fact of death at or about July 13, 1942—as excluding any reasonable hypothesis other than her death, and having, therefore, sufficient probative force to

establish her death. No alternative reasonable explanation had been put forward.

"If the evidence is sufficient to establish Eileen's death, as we hold a jury could have regarded it to be, there was ample evidence pointing to appellant's having murdered her."

This highly interesting case establishes that in New Zealand an accused person may be convicted of murder although there is no proof of the *corpus delicti*, direct evidence of murder, or a confession, provided that the fact of death is proved by circumstantial evidence of such a nature that it is morally certain that death has occurred. This evidence must be "so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for." [1]

J. F. NORTHEY.

WRONGS AND REMEDIES IN ADMINISTRATIVE LAW

IN *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 at 205, Atkin L.J. said that certiorari and prohibition will issue wherever "any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority . . . ." This statement of the law, which has often been quoted with approval, begged the question what was meant by a "duty to act judicially." In some cases it was suggested that it meant only a duty to follow a procedure analogous to the judicial. If this view implied that certiorari would not issue to a body unless that body was under a duty to hear two sides to a controversy, it was irreconcilable with a number of cases, both ancient and modern, in which certiorari had issued to bodies that were under no such duty (*cf.* Note, 14 M.L.R. at 73). That the applicant for certiorari is not necessarily obliged to "find the *lis*" is confirmed by *R.* v. *Manchester Legal Aid Committee, ex p. Brand (R. A.) & Co.* [1952] 1 All E.R. 480. An area committee set up in pursuance of the Legal Aid Scheme, 1950, to administer the Legal Aid and Advice Act, 1949, had granted a legal aid certificate to a trustee in bankruptcy in connection with civil proceedings that had already been instituted by the bankrupt. The defendants in these proceedings applied for certiorari to quash the certificate on

[1] By s. 2 (1) of the Capital Punishment Act, 1950, the Crimes Amendment Act, 1941, was amended by providing that everyone who commits murder shall upon conviction be sentenced to death. However, although capital punishment for murder was reintroduced in 1950, Horry was not sentenced to death. Section 2 (3) of the 1950 Act provided that the Act would not apply to offences committed before the passing of the Act.

[This case is in several respects similar to the English case of *R.* v. *Camb*, The Times, March 23, 1948; "The Trial of James Camb" (*Notable British Trials*, Vol. 71, 1949)), although in that case the evidence to establish the fact of the missing victim's death was even stronger. Camb was reprieved at the time when the death penalty had been temporarily suspended by executive action during the debates on the Criminal Justice Bill.—Ed.]

the ground that the committee, in granting the certificate, had erroneously had regard to the means of the bankrupt instead of to the means of the trustee. The committee contended (inter alia) that its proceedings were purely administrative and were therefore not subject to certiorari. The Divisional Court, in a reserved judgment delivered by Parker J., found in favour of the applicants and ordered the certificate to be quashed. The " duty to act judicially," it held, might arise " in widely different circumstances which it would be impossible, and, indeed, undesirable, to attempt to define exhaustively " (at 489). The duty might arise in the course of arriving at a decision based wholly or partly on grounds of " policy "; thus, a Minister's decision to confirm a clearance order is preceded by a consideration of proposals and objections, and this statutory procedure imposes on him the further common law duty of acting judicially. Even where an administrative body is not required to decide anything resembling a *lis*, it is under a duty to act judicially if, as in the present case, it has to decide the matter before it " solely on the facts of the particular case, solely on the evidence before [it] and apart from any extraneous considerations." The committee was not entitled to refuse a certificate because it thought that the designated fund was becoming depleted or that certain forms of action should be discouraged. On the other hand, an administrative body that " at no stage has before it any form of *lis* and throughout has to consider the question from the point of view of policy and expediency," is not under any duty to act judicially (and is presumably not amenable to certiorari even if it exceeds its authority).

The decision is to be welcomed: certainly it would be deplorable for a court to hold that an administrative body which has exceeded its lawful authority is immune from control by certiorari. There is also much to be said for a refusal to lay down a comprehensive definition of " judicial " duties; but the law has become so confused by some of the decisions in cases where the complaint was not one of simple excess of authority but of breach of the rules of natural justice that a more thorough appraisal would have been valuable. Possibly, however, a Divisional Court would have experienced considerable embarrassment in attempting to explain such decisions as *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66.

It is unfortunate that the court should have lent countenance to the view that the functions of a body which has no " *lis* " before it and which decides solely in accordance with its views of " policy " cannot possibly be characterised as judicial. Leaving aside the difficulty of distinguishing between a " policy decision " and the exercise of a " judicial discretion," surely there is no sound reason why an excess of jurisdiction in the one case should be exempt from the consequences that would ensue in the other? There have indeed been cases in which the courts have assumed, without argument, that certiorari will issue to authorities which, according to Parker J.'s test, are under no duty to act judicially: see *R.* v. *Minister of*

Health, ex p. Dore [1927] 1 K.B. 765; *R.* v. *Minister of Town and Country Planning* [1951] 1 K.B. 1. And (*pace* the *Stevenage Case*) it is possible to imagine circumstances in which the courts would have shown little hesitation in characterising the functions of the Minister under the New Towns Act as judicial.[1]

S. A. DE SMITH.

POLICY AND DISCRETION IN LICENSING CASES

ON an earlier page of this volume (p. 73) Mr. de Smith has noted with approval the reserved judgment of the Divisional Court in *R.* v. *Torquay Licensing JJ., ex parte Brockman* [1951] 2 K.B. 784. It will be recalled that the case revives the problem, much discussed in modern constitutional law, of how far persons entrusted with a discretion are entitled to lay down (or at least to announce that they have laid down) principles to direct them in the exercise of that discretion. The chairman of the licensing justices had stated at the adjourned annual general meeting that in future the circumstances would have to be very special before full licences would be granted to those who held restricted licences. An order of *mandamus* was refused on the ground that the justices had in truth determined the case on the merits, for they had genuinely considered whether facts existed which took the case out of the general rule which they had laid down for themselves. Lord Goddard C.J. summed up the position thus: "Justices cannot make a rule to be applied in every case without hearing it. They may lay down for themselves a general rule, but they are bound to consider whether it is applicable to any particular case." The earlier case of *R.* v. *Rotherham Licensing JJ.* [1939] 2 All E.R. 710 was distinguished on the ground that the justices there had failed to determine the case on the merits because they had followed a general rule which they had laid down for their own guidance without considering whether it was in the public interest that a licence should be granted.

Mr. de Smith says that "the law laid down in the *Torquay Case* is firmly rooted in sound sense" because nearly every bench of justices has some sort of policy on matters which come before them and it is desirable in the public interest that they should make it as widely known as possible, for then applicants to that particular bench would know what to expect. No doubt this is true enough, although it may be observed that persons holding administrative positions who enunciate for the public benefit rules of conduct which they are under no obligation to lay down but which they propose to follow have had levied against them the wounding imputation of

[1] That proceedings before an administrative body may be judicial for some purposes (including amenability to certiorari) but not for others is further emphasised by observations of Parker J. in *Hanily* v. *Minister of Local Government and Planning* [1952] 1 All E.R. 1293 at 1297.

indulging in " administrative quasi-legislation," but it is submitted that the assumption upon which it rests, that justices are entitled to adopt general rules for their guidance in cases where they have a discretion, is not supported by the reasoning to be found in cases of good authority in other branches of the law.

In *Hyman* v. *Rose* [1912] A.C. 623, the House of Lords had to consider the discretionary power granted by the Conveyancing Act, 1881 (now L.P.A., 1925, s. 146 (2)) to relieve a lessee against the forfeiture of his lease. In the Court of Appeal, Cozens-Hardy M.R. had formulated some rather elaborately worded principles for the exercise of this discretion, but Lord Loreburn L.C. said:

> " I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which all or any of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must, and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

It is true that this language does not positively exclude the doctrine which has found favour in the *Torquay Case* but it clearly indicates some of the dangers inherent in that decision. If Parliament has provided that a licence may be obtained if the justices in their discretion see fit to grant one it is hard to see why an applicant should have to undertake, in Lord Goddard's own words, " the very considerable onus " of persuading the justices to depart from some line of policy which they have laid down for themselves without authority from Parliament. The applicant in such a case may well complain that the justices (however excellent their motives) are administering some local self-imposed law and not the general law of the land. The fact that they have chosen to announce their practice publicly only serves to emphasise this fact and not to justify it.

The point was clearly made by the Court of Appeal in *Wickins* v. *Wickins* [1918] P. 265, which dealt with the discretionary power created by section 31 of the Matrimonial Causes Act, 1857 (now section 4 of the Act of 1950) to pronounce a decree of divorce despite conduct on the part of the petitioner which would normally be considered a bar to a decree.

> " (W)here Parliament has invested the court with a discretion which has to be exercised in an almost inexhaustible variety

> of difficult and delicate circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the jurisdiction of the Divorce Division than the legislature has thought fit to impose."

If it be said that these are not licensing cases the answer is that there is no good reason why the law which decides how far persons entrusted with a discretion may fetter themselves in the exercise of it should vary according to the subject-matter upon which the discretion operates. In any case, it would be surprising if the law permitted a wider latitude to magistrates than it is prepared to concede to a High Court judge.

It may be that the *Torquay Case* has really done little to alter the law, for it recognises that justices are still obliged to decide the case on the merits in the sense that they must consider whether the facts disclosed by the applicant justify the application of the rules they have laid down for their own guidance. But although the burden of proof was always on the applicant it seems hard to allow justices to increase that burden by setting up against him what is in effect a rebuttable presumption that the case should not be decided on its merits and thus requiring him to discharge what may be " a very considerable onus."

Finally, it may be remarked that the case is an interesting illustration of the well-known judicial dislike of exercising wide discretionary powers without any guidance from the books. As Professor Lawson has recently said, " They are less inclined to exercise discretionary powers than the public is to commit such powers to them " (*The Rational Strength of English Law*, p. 67).

R. F. V. Heuston.

The Extent of Crown Privilege

In 1940 the Board of Trade made an order vesting gold belonging to a Dutch banking company in the Custodian of Enemy Property. The Custodian sold gold and used the proceeds to buy Treasury bills at a discount, paying income tax on the profits. In 1950 the Custodian transferred the property to the Administrator of Hungarian Property. The Dutch banking company first obtained judgment for the property against the Administrator and in the present case—*Bank Voor Handel en Scheepvaart* v. *Slatford* [1952] 1 All E.R. 314—made an application by action against the Custodian to determine whether the sums to be paid over should not include the amount of income tax paid by the Custodian. The Bank claimed, in effect, that the Custodian partook of the immunity of the Crown from income tax and it is on this that the importance of the case arises.

Devlin J. held that the income tax should not have been deducted and, in determining the position of the Custodian *vis-à-vis* the Crown, made a close analysis of the idea of Crown service or status. The learning that has gathered around the concept of the Crown is so much a mixture of totem and taboo that it is refreshing to read a judgment which deals so expertly with realities. At the same time, it seems to me that the common law has developed, not by a rejection of inadequate terminology, but by extending its meaning and scope.

The judgment of Devlin J. falls into two parts. The first part dealt with the plaintiffs' contention that the Custodian was a Crown "servant or agent." The learned judge considered that this term was too imprecise to be of value and that it confused the issue by suggesting that the extent of Crown immunity could be determined by reference to the presence or absence of the "normal incidents of ordinary service." These incidents were, in his opinion, primarily obedience to orders, and less importantly (indeed, of no importance at all if this primary incident was absent), the method of appointment and pay and the measure of control exercised over the subordinate. Devlin J. pointed out, first, that Ministers do not in fact take orders from the King and are, moreover, invested with many statutory powers; secondly, that judges and magistrates are appointed by the Lord Chancellor and the servants of many public boards and corporations are appointed by Ministers and that the Speaker and all judicial officers are paid out of the Consolidated Fund; thirdly, that the considerable control exercised over the Custodian by the Board of Trade was nevertheless a control limited by the terms of the statute which established the relationship. The learned judge argued from these points that Ministers are not strictly servants or agents, that appointees of the great officers of State are not necessarily servants or agents of the Crown, that payment out of the Consolidated Fund is equally inconclusive and that close control by a Government Department tends, if that control is delimited by statute, to negative the relationship of master and servant because "the power to direct a servant how to perform his duties is normally at large." Devlin J. therefore rejected the value of the plaintiffs' contention that the Custodian was a "servant or agent of the Crown."

It is respectfully suggested that this approach to the problem is not altogether helpful. The learned judge assumes that the relationship of master and servant at common law is clearly fixed and is easily ascertainable by reference to certain "incidents of service," and he emphasises the test of "obedience to orders." Yet it is precisely on this point that the common law doctrine has vitally changed over a number of years. A servant was one who was "subject to the command of the master as to the manner in which he shall do his work" and an independent contractor was distinguishable by this test. "Obedience to orders" is a fish in the same

kettle. And both are now in the sink. The old common law doctrine has long been inapplicable to modern conditions (see *Cassidy* v. *Ministry of Health* [1951] 1 All E.R. 574, and the note by Professor Kahn-Freund in 14 Mod.L.R. 504). But the modification of the old doctrine has not been to abandon the term " servant or agent " but to enlarge its meaning. It is too late now to reverse that trend. If the term is rejected, what becomes of the Crown Proceedings Act, 1947? Or are we to keep one term for purposes of liability and find another for purposes of immunity?

In the second part of his judgment, Devlin J. held that the Custodian enjoyed the immunity of the Crown because he had " Crown status." This phrase the learned judge borrowed from the judgment of Scott L.J. in *London County Territorial and Auxiliary Forces Association* v. *Nichols* [1949] 1 K.B. 35. Without attempting to " explore the extremities of Crown status," Devlin J. found sufficient the fact that the Custodian had duties bringing him " within the sphere of two of the most ancient and peculiar prerogatives of the Crown—the power to make war, including the power to take for itself the property of an enemy found within the realm, and the power to make peace." Against this it was argued that the Custodian was a creature of Parliament established to hold the property *in medio*, keeping it out of the grasp of the Crown whose prerogative was expressly preserved by the statute. Devlin J. rejected this argument on three grounds. He said, first, that Parliament was defining and modernising the prerogative power though preserving the common law right for use in some quite exceptional case. Secondly, the learned judge said that the close control exercised by the Board of Trade " does not show service in the strict sense but it does show that the Custodian is intended to be an instrument of government " and that therefore Parliament did not intend the Custodian to act in opposition to the prerogative. Thirdly, Devlin J. did not find impressive the argument that the Crown could not take the Custodian's holdings for any purpose it wanted and as freely as its own property. He agreed that this limitation might make difficult the establishment of the relationship of master and servant but considered that the difficulty disappeared if the Custodian was regarded as an official with Crown status.

Does the use of the phrase " Crown status " help to solve the problem? Scott L.J. certainly does not appear to have thought he was inventing a new concept. His judgment was based on one of the oldest phrases. He said: " As regards status, we are of opinion that a Territorial Association is, like a Minister or organ of the Central Government, a direct emanation from the Crown " ([1949] 1 K.B. at 47). The use of " emanation " had been frowned on by the Privy Council in *International Ry.* v. *Niagara Parks Commission* [1941] A.C. 328, which had preferred the term " servant or agent." When Day J. spoke of " emanation " in *Gilbert* v. *Corporation of Trinity House* (1886) 17 Q.B.D. 795, all he seems to

have been saying was that if a body was exercising functions previously exercised by the Crown and now transferred, it would be able to claim Crown immunity. Both Scott L.J. in the *Nichols Case* and Devlin J. in the present case were able to find that the disputed body was exercising such prerogative functions. But what if the Crown prerogative had not been expressly preserved by the statute in the present case? Is not the use of "Crown status" in fact itself as regressive as the other phrases?

There seems to be a simpler solution. The Custodian is an official of the Board of Trade, a civil servant. He is appointed by the Board under a statute which empowers the Board to vest in him certain properties, to confer and impose on him certain rights, powers and liabilities and to exercise over his actions very great control. Cannot the question be: "Has Parliament authorised the appointment by the Board of Trade of a person enjoying such a degree of independence that he must be regarded as an institution separate from the Board *or* has Parliament merely institutionalised a part of the Board of Trade?" The answer to the question can be determined by having regard to the method of appointment and of pay, the nature of the duties, the amount of discretion and the degree of control. Basically, is the Custodian recognised as a part of the organisation known as the Board of Trade? If so, with the greatest respect to Devlin J., let us call him a servant or agent of the Crown and say that that sort of person now falls within the meaning of that term. The classicism of Humpty Dumpty could not be more apt: "The question is which is to be master—that's all."

J. A. G. Griffith.

Exercise of Rule Making Power—Earliest Date—Registered Designs Act, 1949

In the case of complicated statutes and rules made thereunder, the legislator frequently applies the technique of fixing a date when the Act shall come into operation and of exercising a rule making power conferred by the Act before that date. This technique is sanctioned by the Interpretation Act, 1889, s. 37, but only "so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof."

In *Usher* v. *Barlow* (1952) 69 R.P.C. 27, it was argued that the rule making power under the Registered Designs Act, 1949, had been exercised prematurely in respect of a particular rule, and that accordingly this rule was *ultra vires* and void. The Court of Appeal held that the rule was covered by section 37 of the Interpretation Act and was valid, but the Master of the Rolls felt some difficulty in arriving at this conclusion.

The Registered Designs Act, 1949, enacted on December 16, 1949, provides in section 49 (2) that the Act should come into operation on January 1, 1950. Under section 1 (4) power is given to the Board of Trade to exclude from registration under the Act designs for certain articles primarily of a literary or artistic character. Under section 36 general rule making powers are given to the Board of Trade for regulating matters placed under the direction or control of the registrar or the Board. The powers under both these sections were exercised by the Board of Trade on December 16, 1949, to make the "Designs Rules, 1949," S.I. 1949, No. 2368, stated to come into effect on January 2, 1950. The rules deal generally with the business of the registrar, forms to be used, fees to be charged and a host of other procedural matters. Rule 26 recites the power conferred in section 1 (4) of the Act and provides that designs to be applied to certain works of sculpture, certain printed matter, medals and wall plaques shall be excluded from registration.

The plaintiff prior to January 1, 1950, had produced and published a wall plaque which had not been registered under the Registered Designs Act or the previous Designs Act. He contended to be entitled to copyright in the wall plaque under the Copyright Act, 1911, without registration. This contention was correct at law provided registration of the wall plaque was effectively precluded by Designs Rule 26. The defendant argued that the wall plaque could have been registered under the Designs Act because Rule 26 precluding its registration was *ultra vires* and void on the ground that it was made before the commencement of the Act, although it was not necessary and expedient to make it at that date for the purpose of bringing the Act into operation. The Attorney-General was heard as *amicus curiae* and reference was made to *R.* v. *Minister of Town and Country Planning, ex p. Montague Burton, Ltd.* (1950) 2 All E.R. 282. In that case, it had been decided that rules providing the machinery necessary for an Act to function as soon as it comes into operation are clearly within section 37 of the Interpretation Act. The majority of the Court of Appeal in *Usher* v. *Barlow* held that this reasoning applied to the present case and laid stress on the point that under the Interpretation Act the rule making power may be used before commencement of the Act not only as far as "necessary" but also as far as "expedient." The court found that it would be highly inconvenient if the making of the rule prescribing the designs to be excluded from registration under the Act had to await the commencement of the Act, as this would involve a period of confusion and uncertainty even to the point of bringing the machinery of registration to a standstill, so that the rule was properly made before the Act came into operation. The Master of the Rolls agreed with the result, but only because Rule 26 was part of a larger body of rules made under the general powers of section 36 of the Registered Designs Act which were clearly justifiable, as expedient or necessary, to give the new Act working machinery.

This being so, he did not think it right to pick out one rule because in isolation it might fail to satisfy the requirements of the Interpretation Act. In the circumstances, therefore, the Master of the Rolls held Rule 26 to have been validly made. He stated, however, that if the rule had stood by itself he would not have found it easy to persuade himself that in order to enable the Act effectively to operate it was necessary to make before its commencement a rule excluding wall plaques from registration under the Act.

Had the rule stood by itself the Master of the Rolls would accordingly have held it *ultra vires* and invalid because the power of making it had been exercised prematurely.

On the basis of the present wording of section 37 of the Interpretation Act, 1889, a reasoning similar to that of the Master of the Rolls in *Usher* v. *Barlow* might be applied in future to other rules made prior to the date of commencement of the Acts containing the respective rule making power. Pending a decision by the highest tribunal the validity of such rules may therefore be in doubt for considerable periods. In order to avoid such a situation, it may be desirable to amend the Interpretation Act, 1889, by removing all restrictions as to the earliest date for the exercise of the rule making power once a statute conferring the power has been enacted.

P. Meinhardt.

Contributory Negligence

The decision of the Court of Appeal in *Drinkwater* v. *Kimber* [1952] 1 All E.R. 701 raises some interesting points on the scope of the Law Reform (Contributory Negligence) Act, 1945. The female plaintiff was a passenger in a van driven by the male plaintiff, her husband, when they were involved in a cross-roads collision with a car driven by the defendant. The wife claimed damages for personal injuries against the defendant, who counterclaimed against the male plaintiff, alleging that the latter's negligence contributed to the accident.

The defendant was unable to invoke the machinery for contribution provided by section six of the Law Reform (Married Women and Tortfeasors) Act, 1935, as, by reason of his position as husband of the female plaintiff, the male plaintiff was not a person "who would, if sued, have been liable." The counterclaim was therefore phrased in the words of section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, the defendant alleging that any damages he might have to pay the wife were "damage suffered as the result partly of his own fault and partly of the fault" of the husband. This counterclaim was not, therefore, for contribution, but for damages for negligence.

At the trial of the action Devlin J. found that the defendant was two-thirds and the husband one-third to blame. The wife therefore

recovered in full against the defendant, her damages being assessed at £405. The defendant's counterclaim against the husband for one-third of this sum was dismissed. On appeal against the dismissal of the counterclaim, the decision of the learned trial judge was upheld.

The two main grounds of this decision were that the defendant had no cause of action against the husband and that he had not suffered "damage" within the meaning of the Act.

On the first point, counsel for the defendant accepted the proposition advanced by Singleton L.J. that section 1 of the Act "does not create a right of action; it removes an obstacle." He contended, however, that such an action for negligence had always existed, though prior to 1945 it was strangled at birth by the claimant's necessary allegation that he had himself been adjudged guilty of negligence. If one applies to these facts the classic definition of Lord Atkin in *Donoghue* v. *Stevenson* the formulation of the duty will run thus: "I must take reasonable care to avoid driving my car in such a way as to involve another person in a collision as a result of which I can reasonably foresee that he will be compelled to pay damages to a third party who I can reasonably foresee may be injured." It is submitted that the whole underlying assumption of the 1945 Act is that one must foresee that another person may be negligent. If the careless pedestrian who steps off the pavement had looked more carefully there would have been no accident, yet the equally negligent driver cannot maintain that he is under no duty at all to envisage acts of folly. His duty undeniably exists, though the extent of his liability may be reduced. Similarly the driver in the present case must foresee that he and another may together cause injury to his passenger, and he must foresee that by inexorable process of law that other may be held liable for the whole of the damage thus caused.

Morris L.J., who was the only member of the court to deal in any detail with this point, held that "the reason the defendant has been held liable to Mrs. Drinkwater is because he himself was negligent to her and caused her damage. He has not been held liable because Mr. Drinkwater was negligent towards her." And again, "That Mr. Drinkwater's negligence towards the defendant caused him to be negligent towards Mrs. Drinkwater was not alleged, and was not proved, and was not held. The defendant does not, therefore, establish any cause of action against Mr. Drinkwater." This reasoning is summarised on page 706 of the judgment, where Morris L.J. says that it is very doubtful whether the defendant suffered damage "as the result partly of his own fault, and partly of the fault of any other person." "The legal liability to Mrs. Drinkwater . . . flowed only from his own fault."

It is respectfully submitted that another view may be taken. The Act deals with a situation where two people contribute to cause damage. The situation which falls outside it may be expressed

thus: "The reason that the claimant suffered damage was because he and no one else was at fault." This is not true of the claimant in the present case. The reason that he suffered damage was because he was involved in a collision, and it is not true of that collision that "he and no one else was at fault." The Court of Appeal, it is submitted, was envisaging another formulation: "The only reason that he suffered damage was because he was at fault." In the normal case of the contributorily negligent pedestrian these formulations will appear to mean the same thing, but in the facts of the present case the latter cannot mean "he and no one else was at fault." It must mean "the only reason that he suffered damage was because he and another (the defendant to the counterclaim) were at fault." He is thus in the position of the contributorily negligent pedestrian whose accident, it may be abundantly clear, would not have happened but for the negligent acts of both himself and the driver. Yet this person is clearly within the Act, and it is suggested that the defendant in the present case is in a precisely similar position.

The authorities, it is submitted, lead to a similar conclusion. Wherever contributory negligence has not formed an absolute bar, the remedy has been granted. In *Mowbray* v. *Merryweather* [1895] 2 Q.B. 640, the defendants supplied to the plaintiffs a defective chain, which broke, injuring the plaintiffs' employee. The plaintiffs settled his claim, and sued the defendants for that sum, as damages for breach of contract. They succeeded, and it was not suggested that the compensation paid to the workman was due "solely" to the employers' breach of duty, and not to the suppliers' breach of contract. Where the Maritime Conventions Act, 1911, has lifted the bar, there is a right of action of the type claimed in the present case. The decision of the Court of Appeal in *The Cairnbahn* [1914] P. 25, though distinguished by the court in this case in the second limb of its decision, was not distinguished as regards the existence of a cause of action. In British Columbia, where contributory negligence legislation preceded contribution between tortfeasors, a similar result was reached.[1]

The second ground of the decision was that the payment of damages to another is not "damage" within the meaning of section 1 (1) of the Act. "'Damage' includes loss of life and personal injury"; this, in section 4, is the only definition given in the Act. The court held that "damage" in this Act does not include financial loss, distinguishing *The Cairnbahn*, where recovery in similar circumstances was allowed in Admiralty, on the grounds that the Maritime Conventions Act, 1911, uses the words "damage or loss."[2] It is

[1] Contributory Negligence Act, 1925, c. 8. And see *Price* v. *Fraser Valley Milk Producers Assn.* [1932] 2 W.W.R. 65.

[2] "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault."

submitted that the excerpts from the judgments quoted by Morris L.J. do not establish that the court in that case regarded " damage " as incapable of meaning loss, or that they relied solely on the presence of that word. The difficulty lay in the words " damage to one or more of those vessels," and the word " loss " was invoked to show that " vessel " meant " owners of the vessel " and that " damage " was not confined to the physical. The 1945 Act presents no such difficulty. The words " where any person suffers damage " must necessarily mean " financial loss " if it is not to be confined to personal injuries. The Court of Appeal in the present case confined " damage " to the results of physical injury and to loss arising from physical damage to property.

It is respectfully suggested that the wording of the Act does not indicate such an interpretation. The limited scope of the definition section is explained by the obvious desire of the draftsman to forestall the interpretation which the courts were inclined to put on the word " damage " in section seven of the Admiralty Court Act, 1861.[3]

If pure financial loss is to be excluded from the operation of the 1945 Act, certain unexpected results may follow. If an employer contributes to cause an accident in which his employee-passenger is injured, the employer can recover from the other driver nothing for loss of services, for his is pure financial loss, not arising out of any personal injury to him. Similarly, a wife whose driving contributes to kill her husband-passenger will presumably have no claim at all under the Fatal Accidents Acts for though there is, curiously, no authority, she must surely have been wholly barred prior to 1945. Hers is a claim for pure financial loss, and she is not assisted by section 1 (4) of the Act which concerns only the contributory negligence of the deceased. In the present case the male plaintiff's claim for his wife's medical expenses was settled out of court. Presumably his contributory negligence should have barred him completely from recovering this pure financial loss.

Two further matters influenced the decision of the court. Firstly, the court must record the total damages which would have been recoverable if the claimant had not been at fault (section 1 (2)). This sum, it was said, would have been nil. It is submitted that this sum should be the total damage recovered by the wife, for, if two actions had been brought, the court in the second action would be considering for the first time the allocation of responsibility, and it may record the notional sum of the damages paid. Secondly, it was pointed out that section 1 (3), in applying the provisions of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, to the new situation, retains the limitation contained in

[3] " The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

See: *Smith* v. *Brown* (1871) L.R. 6 Q.B. 729, 732; *Seward* v. *The Vera Cruz* (1884) 10 App.Cas. 59.

Contrast: *The Theta* (1894) P. 280, 283, the only direct decision on the point.

that section, which cannot, therefore, have been inferentially abolished by section 1 (1) of the 1945 Act. Two comments may be made on this. Firstly, there will not always be a duty as between the tortfeasors so as to invoke section 1 (1) of the Act. For example, I cannot, as a motorist, foresee that a driver in another street and I will simultaneously crash through a house and injure the occupant. It is not unreasonable that I should be under a further liability when I owe a positive duty to another than when I do not do so. Secondly, the subsection envisages three parties who are negligent, whilst in the present case there are only two.

The result of this decision is that once again, in spite of the pious hopes of the Law Revision Committee on Contributory Negligence, I am subject to different legal liabilities when I am driving my motor car and when I am sailing my yacht. The opinion may be ventured that further litigation will be required before the problems raised by this decision are fully determined.[4]

Raymond Kidwell.

Covenants in Restraint of Trade and the Health Service

Some interesting considerations concerning the principles underlying the validity of covenants in restraint of trade arise from the recent decision of the Court of Appeal in *Whitehill* v. *Bradford* [1952] 1 T.L.R. 66. The facts of the case were briefly as follows:—

In 1945 four doctors entered into a partnership agreement, the effect of one clause of which was to prohibit a retiring partner from practising as a general practitioner for 21 years within a radius of 10 miles of the partnership surgery. The partners subsequently became listed as general medical practitioners under the National Health Service Act, 1946, by section 35 of which it became an offence, punishable by fine, for a "listed" practitioner to sell the goodwill of his practice. On the retirement of one of the partners, the court held (1) that the covenant did not impose an unreasonably wide restriction; and (2) that the National Health Service Act, 1946, did not destroy the goodwill, so that there remained after 1946 a proper subject-matter for protection.

The following points seem to call for comment:—

(1) *The Question of Reasonableness*

It is well settled that a restrictive covenant is only enforceable if it is (a) reasonable in the interests of the parties; and (b) not against the public interest.[1] In the present case the argument

[4] Further discussion of the situation in *Drinkwater* v. *Kimber* may be found in "Joint Torts and Contributory Negligence" by Professor Glanville Williams, to which the present writer is greatly indebted.

[1] *Nordenfelt* v. *Maxim Nordenfelt Gun & Ammunition Co.* [1894] A.C. 535, 567, *per* Lord Macnaghten: a covenant is valid only "if the restriction is reasonable—reasonable, that is, in the interests of the parties concerned *and* reasonable in the interests of the public."

was only concerned with the first requirement. Perhaps this was because of the view expressed by Evershed J. (as he then was) in *Routh* v. *Jones*[2] that "if the covenant in question is shown to conform to the proper interest of the covenantor and the covenantee . . . then the public interest would be equally served."[3] But this statement is contrary to high authority;[4] and in any case the validity of such general statements is notoriously ephemeral in this branch of the law. The law concerning restraint of trade has always been ready to adapt itself to changes in social conditions. It would seem that the introduction of the Health Scheme was, apart from any special statutory provision, an important social change which might be expected to have some effect on this branch of the law. It is therefore to be regretted that the defendant—who had the task of adducing facts and arguments showing that the restraint was contrary to the public interest[5]—did not press this point with more urgency. In particular, the fact that a partner who leaves the partnership may receive compensation out of public funds might leave scope for the argument that it is contrary to the public interest that the public should both pay such compensation and be to some extent deprived of the services of the recipient of the compensation. Also, in appropriate circumstances, it might now be argued that a covenant restraining a doctor from practising in a particular area would be contrary to the public interest if there is an acute shortage of "listed" practitioners in that area. Whether in any area there is such a shortage is, of course, a question of evidence, and as no such evidence was adduced this particular argument was not open in the present case. But it does not follow that this argument is never open to the covenantor in similar cases.

[2] [1947] 1 All E.R. 179.

[3] *Ibid.*, at p. 182.

[4] *e.g.*, *McEllistrim's Case* [1919] A.C. 548, 562; *Att.-Gen. for Australia* v. *Adelaide Steamship Co.* [1913] A.C. 781, 796; *Morris* v. *Saxelby* [1916] A.C. 589, 700. But see *North-West Salt Co.* v. *Electrolic Alkali Co.* [1914] A.C. 461.

[5] It is generally said that the burden of proving that the covenant is reasonable in the interest of the parties lies on the covenantee and that the burden of proving that it is contrary to the public interest lies on the covenantor. But this is misleading because the question of reasonableness is one of law, and there can be no burden of *proving* an issue of law. The only correct statement of the principle in the reports which the writer has found is by Lord Parker of Waddington in *Morris* v. *Saxelby* [1916] 1 A.C. 689, 706: "As I read Lord Macnaghten's judgment [in the *Nordenfelt Case*] he was of the opinion that all restraints on trade are contrary to public policy and therefore void . . . except in such cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved it is a question of law for the decision of the judge whether they do or do not justify the restraint. *There is no question of onus either way.*" It is interesting to note that when Younger L.J. quotes this passage in *Attwood* v. *Lamont* [1920] 3 K.B. 571, 588, he omits the last two sentences, thereby materially altering the sense of the passage. If the question is one of law, the practical effect is that a finding that the covenant is not in the public interest may be based on argument as well as on evidence.

(2) *The Effect of the National Health Service Acts*

The part of the decision in *Whitehill* v. *Bradford* can be explained on a very narrow ground. The provisions of section 35 of the National Health Service Act, 1946, have been outlined above. By section 1 (3) of the National Health Service (Amendment) Act, 1949, section 35 of the 1946 Act " shall not affect . . . the exercise or performance under any partnership agreement to which this section applies [6] of any right or obligation of a partner to sell to, or purchase from another partner any share in the goodwill of the partnership practice, but any such agreement shall have effect subject to the following provisions of this section." By section 1 (5) of the same Act, where any partnership agreement to which this section applies confers an option on a " listed " partner to purchase the share of a " listed " partner and that option has been exercised " that share shall be transferred at the time and on the terms (except as to the payment of the purchase price) provided in the agreement. . . ." Such an option was contained in the present agreement and was exercised on the retirement of the defendant from the partnership. The terms of the option were therefore saved by section 1 (5) except that the retiring partner did not receive payment from the continuing partners but received instead compensation determined in accordance with regulations made pursuant to the Acts. If it be argued that section 1 (5) is confined to saving merely that part of the agreement relating to the conferment and exercise of the option, recourse can be had to the wider saving powers of section 1 (12) which provides that " where any agreement to which this section applies contains provisions which take effect on the purchase of any share or part of a share of the goodwill of the partnership practice, those provisions shall take effect in like manner on the transfer of that share or part in accordance with this section, notwithstanding that the transfer does not constitute a purchase." The combined effect of subsections (3), (5) and (12) therefore seems to have been to save the covenant in this case—*i.e.*, its validity fell to be determined solely by Common Law principles.

The wider question as to the effect of section 35 of the 1946 Act on a covenant in a partnership agreement which is not within section 1 of the 1949 Act was, however, also discussed, and is of more general interest. The defendant argued that, as the goodwill was no longer saleable, it could not be regarded as a " proprietary interest " which could validly be protected by a restrictive covenant. This argument was rejected by Sir Raymond Evershed M.R. " The goodwill remains one of the assets of the firm, but it is subject to the limitation that it cannot be sold to other people. So long as

[6] *i.e.*, " any partnership agreement in force on and immediately before the appointed day between medical practitioners undertaking to provide general medical services ": s. 1 (1) of the 1949 Act. The present agreement fell within that definition.

the firm carries on, the goodwill necessarily remains one of its most valuable assets." [7] This part of the judgment merely illustrates a well-known concept of general jurisprudence—that the rights and powers of an owner over his property may be limited in various ways, and that one such possible limitation is a limitation on his powers of alienation. In general, property is property none the less though it is inalienable.

But in this context such inalienability is of particular importance. The court in the present case stressed the well-established distinction between covenants between master and servant, and those between the vendor and purchaser of a business, and stated the rule that, whereas an employer is not entitled to protect himself against the competition of his employee *per se*, the purchaser of a business can so protect himself against the competition of his vendor.[8] The court held that an agreement between partners was governed by the same considerations in this respect as a vendor-purchaser covenant.[9] The question then arises—what reasons are there for this distinction? There appear to be two—first, that in a vendor-purchaser agreement, the parties are at arm's length, whereas in a master and servant agreement the master has the monopoly of bargaining power; and secondly that " without a covenant on the part of the vendor against competition a purchaser cannot get what he is *contracting to buy*, nor can the vendor give what he is *contracting to sell*." [10] It is interesting to note that this second basis of the distinction is entirely cut away by section 35 of the 1946 Act. The principle that a man shall not derogate from his grant manifestly cannot take effect where the making of the grant is itself unlawful.

G. H. TREITEL.

IMPERFECT GIFT TO EXECUTRIX

As Evershed M.R. pointed out in *Re Freeland* [1952] Ch. 110 at 114, the contest in that case arose " from the amiability of the testatrix . . . towards the two ladies who are the parties to the suit, whom, by what is perhaps a strange irony, she appointed as her two executrices, and each of whom has laid claim, by gift or otherwise, to a specific chattel, namely, a Hillman motor-car." The testatrix had uttered certain words to the plaintiff which could be construed either as words of immediate gift of the car, or as a promise to give the car in the future, but had not delivered the

[7] [1952] 1 T.L.R., at p. 73.
[8] *Morris* v. *Saxelby* [1916] A.C. 689; *Attwood* v. *Lamont* [1920] 3 K.B. 571.
[9] *Empire Meat Co., Ltd.* v. *Patrick* [1939] 2 All E.R. 85, was distinguished on the ground that the covenant there was between master and servant.
[10] *Attwood* v. *Lamont* [1920] 3 K.B. 571, 590; *cf. Leather Cloth Co.* v. *Lorsont* (1869) L.R. 9 Eq. 345, 354; *Morris* v. *Saxelby* [1916] A.C. 689, 701.

car to the plaintiff or perfected the gift in any other way. Subsequently the testatrix wrote a letter to the plaintiff, in effect stating that she proposed to lend the car to the defendant for three or six months but explaining that she had no intention of going back on her word to the plaintiff. When the testatrix died, the plaintiff claimed the car under the doctrine of *Strong* v. *Bird* (1874) L.R. 18 Eq. 315, on the footing that the imperfect gift to her, coupled with an *animus donandi* in the testatrix continuing until her death, had been perfected by the plaintiff's appointment as executrix.

At first instance this contention succeeded, but the Court of Appeal reversed this decision; and it is not without interest that the letter which was almost entirely responsible for the plaintiff's success at first instance was largely responsible for her failure on the appeal. Viewed in one light, the letter was a request addressed to a donee, saying "The car is yours; do you mind if it is lent to the defendant?"; viewed in another light, the letter spoke merely in terms of moral obligation: "I am going to lend my car to the defendant but I am writing to you about it lest you might think I am going back on my promise to give it to you." The conclusion that the latter was the true construction of the letter was supported by the fact that in making the loan the testatrix throughout acted as if she were still the owner of the car. This destroyed the plaintiff's claim, for it was laid down in *Re Innes* [1910] 1 Ch. 188 (and has now been reaffirmed) that the doctrine of *Strong* v. *Bird*, *supra*, can be invoked only where there was a present intention of giving and not where there was a mere intention to make a future gift. A heavy burden of proof lies on any claimant against the estate of a deceased person, and the plaintiff could not satisfy the court that a testatrix, who had acted as owner in lending the car, had throughout had a continuing intention of immediate gift; indeed, if the plaintiff had asked the testatrix for the car, the answer would probably have been "You shall have it when the defendant has returned it." In the result, therefore, the plaintiff's claim failed.

Although unimportant, it is of interest to observe the grounds on which the defendant based her claim to the car, and what the actual result of the case was, apart from the bare fact that the appeal was allowed. Neither of these points appears in the report at [1952] Ch. 110, though both are stated in the report at [1952] 1 All E.R. 16, *sub nom. Jackson* v. *Rodger*. The defendant claimed (a) that she was entitled to the indefinite use of the car, as the loan by the testatrix had imposed no time limit, and alternatively (b) that the car belonged to the estate of the testatrix: [1952] 1 All E.R. 17. The result of the case was that the court made a declaration in the terms of alternative (b): [1952] 1 All E.R. 20.

R. E. Megarry.

The Rate of Exchange: an Urgent Appeal for a Minor Reform of the Law

The decision of the Court of Appeal in *Cummings* v. *London Bullion Co., Ltd.* [1952] 1 All E.R. 383 relates to facts of the utmost simplicity. On August 15, 1949, when the pound was equal to $4.03, the defendants became liable to pay to the plaintiff, a resident of the United States of America, the sum of $3,200. The defendants could not pay without the permission of the Treasury, which they obtained on September 29, 1949. By that date the pound sterling was worth $2.80. The plaintiff claimed payment at the pre-devaluation rate and succeeded in the Court of Appeal.

Under the so-called breach-date rule which the Court of Appeal had adopted in *Vionnet et Cie* v. *Wills* [1940] 1 K.B. 72, conversion of the dollars into sterling had to take place at the rate of exchange prevailing at the date of breach. According to section 33 (1) of the Exchange Control Act, 1947, it was an implied condition of the contract " that, where by virtue of this Act the permission or consent of the Treasury is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the consent or permission is given or not required." In these circumstances the question arose whether the breach occurred on August 15, 1949, when the defendants became liable to pay, but could not lawfully pay, or on September 29, 1949, when, as a result of the Treasury permission, payment could lawfully be made. The court answered in the latter sense. This was an almost inevitable solution, because it is obviously impossible to impute default to a debtor who by law is not allowed to perform his obligation. It is quite true that, if between August 15 and September 29, 1949, the plaintiff had instituted proceedings, Schedule IV of the Exchange Control Act would have enabled the defendants to pay the sterling amount of the debt, calculated at the pre-devaluation rate, into court. But this was treated as a special case and since the plaintiff had not instituted proceedings before the Treasury permission was available, the Court of Appeal with every justification refused to depart from the general principle.

The main reason which makes the decision noteworthy is that the Court of Appeal reconsidered the basic question whether English law has in fact adopted the breach-date rule in cases of this kind or whether, in so far as debts are concerned, the rate of exchange prevailing at the date of judgment should be treated as decisive. There cannot be any doubt that the latter view is preferable: see Mann, *The Legal Aspect of Money* (1938), pp. 310 *et seq.* Up to 1940 it seemed that, while in *The Volturno* [1921] 2 A.C. 545, the House of Lords had laid down the breach-date rule in regard to a claim for damages, the point was still open in so far as debts were concerned. The argument (for the details of which see Mann, *loc. cit.* pp. 292 *et seq.*) was based on another case which has made the

name of Cummings famous in the field of monetary law, *viz. Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* [1922] 1 K.B. 451. There the Court of Appeal held that a debt expressed in French francs could be discharged by the payment of the agreed amount of French francs, notwithstanding the fact that proceedings had been instituted in England and that, as a result of the depreciation of the franc, the amount paid by the defendant was, in terms of sterling, much less than the amount of sterling claimed by the English writ and calculated on the footing of the breach-date rule. It seemed possible to suggest that it would be both unjust and illogical if the judgment of an English court would award to the plaintiff more than he was entitled to receive from a defendant paying voluntarily. Although Professor Kahn-Freund made a valiant attempt to keep the argument open (see Dicey (-Morris), *Conflict of Laws*, 6th ed., pp. 746 *et seq.*), the decision in *Vionnet's Case*, *ubi supra*, made it a very tenuous one. It is not surprising, though it is regrettable, that in the instant case the Court of Appeal has rejected it.

It is, however, submitted that the matter should not be treated as beyond repair. The results of the breach-date rule are too iniquitous to permit complacency.

In *Cummings* v. *London Bullion Co. Ltd.*, *ubi supra*, Denning L.J. said at p. 398:

> I take it to be clear law that, when a creditor comes to the courts to enforce a debt payable in a foreign currency, he is entitled to be put into as good a position as if the debtor had done his duty under the contract and paid the debt in the foreign currency without the intervention of the courts. To do this, judgment must be given for the creditor for the debt turned into sterling at the rate of exchange ruling at the date when it should have been paid.

Everybody will applaud the first sentence of this dictum. But it is submitted with the greatest respect that the second sentence cannot be supported. The breach-date rule does not achieve the object stated in the first sentence except where currencies remain stable. Where the value of the foreign currency changes prior to the date of breach, the principle of nominalism precludes any adjustment: see, *e.g.*, *Re Chesterman's Trusts* [1923] 2 Ch. 466. Where sterling depreciates (or the foreign currency appreciates) after the date of breach, conversion at the rate ruling at the date of breach imposes upon the creditor of a sum of foreign currency an unjustifiable loss: the creditor of $1,000 whose debt was due on September 17, 1949, receives after that date only £250, while he needs about £350 to obtain the amount he is entitled to. If sterling appreciates (or the foreign currency depreciates) after the date of breach, conversion at the rate prevailing at the date of breach confers upon the creditor a profit to which he is entitled only if the relevant legal system allows a claim to damages for delayed payment: if on

September 18, 1949, the value of sterling had been increased to $5 per pound, the creditor of $1,000 whose debt was due on September 17, receives about £250 or $1,250, while he ought to receive only £200.

The root of the trouble lies in the English rule of procedure which, for the purposes of a writ and judgment, requires conversion of the foreign currency into sterling. The problem would disappear if those in charge of the Rules of Supreme Court could be persuaded to make a short Rule to the effect that, where the claim is for a sum of foreign currency, the judgment (and, accordingly, the writ) should be for that sum or its sterling equivalent at the date of payment. It is probably no exaggeration to say that to-day the breach-date has been, or is in course of being, abandoned throughout the world, and it is high time that English law falls into line. It can be done almost by a stroke of the pen.

F. A. MANN.

STANDARD OF PROOF OF ADULTERY IN DIVORCE

IN the light of the attention that the question of the standard of proof in divorce cases has recently attracted, a note of the decision of Fell J. in *Price* v. *Price and Another* [1951] N.Z.L.R. 1097 may not be without interest. The hearing took place in October, 1951, and judgment was delivered on November 12, 1951. *Ginesi* v. *Ginesi* [1948] P. 179; [1948] 1 All E.R. 373, *Gower* v. *Gower* [1950] 1 All E.R. 804, and *Davis* v. *Davis* [1950] P. 125; [1950] 1 All E.R. 40 were considered by the learned judge, but apparently *Preston-Jones* v. *Preston-Jones* [1951] 1 All E.R. 124 was not cited by counsel.

The parties were married in 1942. In March 1950, after his wife had found letters from several women addressed to him, Price signed a confession of infidelity and promised not to offend again. However, he did not mend his ways and divorce proceedings were commenced after his wife and an inquiry agent had surprised the respondent and co-respondent [1] in a darkened house at about 11 p.m. Fell J. stated at page 1100 " The woman was dressed in slacks and a jumper, while Price was dressed in trousers and shirt without a jacket. The evidence was that neither their clothing nor the room was disarranged." The respondent denied adultery but " admitted holding the intervener's hand and kissing her when seated on the couch." The learned judge observed that the respondent was an unsatisfactory witness and his inability to remember matters was most unconvincing.

[1] In the law of New Zealand (Divorce and Matrimonial Causes Act, 1928, s. 11 (1)), the term " co-respondent " is applied both to male and to female adulterers.

In reference to *Ginesi* v. *Ginesi* Fell J. stated (pp. 1101-2) that counsel in that case had

> " accepted the statement in *Churchman* v. *Churchman* ([1945] P. 44; [1945] 2 All E.R. 190) that the same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences so called (*ibid.*, 51; 195). It would seem that counsel sold the pass before the battle began, and he is not reported to have referred the court to *Mordaunt* v. *Moncrieffe* ((1874) L.R. 2 Sc. and Div. 374) or *Allen* v. *Allen and Bell* ([1894] P. 248), or to the sections in the Act corresponding with our section 6, which says that ' The court on being satisfied that the allegations . . . are true may make . . . a decree,' and section 17 (1) (*c*), which says that in every case in which relief is sought on the ground of adultery: ' If the court is satisfied on the evidence that the case for the petitioner has been proved . . . the court shall pronounce a decree of divorce.' "

Reference was also made to the decision of the High Court of Australia in *Wright* v. *Wright* (1948) 77 C.L.R. 191 in which its earlier decision in *Briginshaw* v. *Briginshaw* (1938) 60 C.L.R. 336 was examined. Fell J. stated (pp. 1102-3):

> " If *Wright* v. *Wright* ((1948) 77 C.L.R. 191) stood alone, I would be bound to follow the English Court of Appeal in *Ginesi* v. *Ginesi* ([1948] P. 179; [1948] 1 All E.R. 373) which has been followed in New Zealand in *Andrews* v. *Andrews* ([1949] N.Z.L.R. 173), but *Ginesi* v. *Ginesi* ([1948] P. 179; [1948] 1 All E.R. 373) has come under such heavy fire in *Davis* v. *Davis* ([1950] P. 125; [1950] 1 All E.R. 40) and *Gower* v. *Gower* ([1950] 1 All E.R. 804) that I think I may venture to decline with respect to follow it as being inconsistent with prior decisions of the Court of Appeal and the House of Lords in *Allen* v. *Allen and Bell* ([1894] P. 248) and *Mordaunt* v. *Moncrieffe* ((1874) L.R. 2 Sc. and Div. 374) and in conflict with sections 6 and 17 (1) (*c*) of the Divorce and Matrimonial Causes Act, 1928."

After considering *Davis* v. *Davis* and *Gower* v. *Gower* and in particular the judgments of Denning L.J. in those cases, Fell J. concluded (p. 1104):

> " In the present case, there is more than opportunity alone, and there is sufficient evidence to justify the inference that the opportunities would be used for misconduct; and, accordingly, exercising my judgment with caution and applying my knowledge of human nature to the circumstances of this case and this particular respondent, I conclude there is no other reasonable solution than that of guilt, and I hold that adultery has been proved to have taken place between the respondent and the intervener."

J. F. Northey.

The Anglo-Norwegian Fisheries Case, 1951
(I.C.J. Reports 1951, p. 116)

The issue between the United Kingdom and Norway which was adjudicated upon by the International Court of Justice in December, 1951, may be stated simply. During the early years of the seventeenth century, when maritime princes favoured the *mare clausum* rather than the *mare liberum*, the King of Denmark and Norway protested against the presence of foreign fishermen in what were then regarded as the seas belonging to Norway. In the course of time such concepts of sovereignty over the seas outside the generally recognised limits of territorial waters became discounted. In 1906 British fishermen appeared in the vicinity of the fishing banks near the Norwegian coast, and in 1911 a British ship was seized for alleged violation of Norwegian waters. Diplomatic discussions ensued between Great Britain and Norway, but to no purpose. Finally in 1935 a Norwegian Decree was issued limiting Norwegian waters by reference to a four-mile belt seaward from straight base-lines drawn between 48 named points on Norwegian promontories, islands and drying rocks, closing a large area of water formerly regarded as high seas and important to the British fishing industry.

The United Kingdom applied to the World Court for a judgment declaring the principles of international law to be applied in defining the base-lines by reference to which Norway was entitled to delimit a closed fisheries zone, and to award damages for the wrongful seizure of British ships outside that area. Norway, on the other hand, asked the court for a declaration that the delimitation of the 1935 Decree was not contrary to international law. The court by ten votes to two, Judge Sir Arnold McNair and Judge Read of Canada dissenting, held that the system employed by the Norwegians was not contrary to international law, and by eight votes to four, Judge Hsu Mo of China and an unidentified judge having joined the dissidents, that the lines actually drawn were similarly compatible. Apparently, Judge Hackworth of the United States was not convinced of the Decree's compatibility with international law, for, while concurring in the operative part of the judgment, he "desires to emphasise that he does so for the reason that he considers that the Norwegian Government has proved the existence of an historic title to the disputed areas of water."

The problem of the limits of territorial waters is almost a perennial in international law, for although it was on the agenda of the 1930 Codification Conference it is one of the subjects considered suitable for codification by the International Law Commission. While, before 1951 at least, there was no doubt that States could not, at their own discretion, draw their maritime limits wheresoever they wished, the most that could be said from the point of view of international law was that States were entitled

to a maritime belt as least three miles wide which, so it was generally believed, should be measured seaward from low water mark more or less following the sinuosities of the coast. There were some States that refused to recognise the three-mile limit, and, for the purpose of this case at least, Great Britain recognised the Norwegian claim to a belt four miles wide.

The institution of territorial waters which is a manifestation of State jurisdiction is a derogation from one of the basic principles of customary international law, that of the freedom of the seas. It is essential, therefore, that some method of demarcation be applied which would assist in the adjustment of these conflicting claims. In practice most States, including the United Kingdom, have used the "arcs of circles" principle—which should be compared with what Professor H. A. Smith in his *Law and Custom of the Sea* calls the "double-radius rule." This is the counterpart of the method employed at sea in ascertaining a ship's distance from the coast to determine whether she is outside territorial waters or not. The court said that this principle only dated from 1930 when it was introduced by the United States. In fact, as a method of measurement, although perhaps not under that name, it has been used so long that Judge Read described it as the traditional method for at least a century-and-a-half, although he agreed that it was not a rule of customary law. Another method sometimes applied, particularly in connection with a highly indented coast, is that of the straight base-lines drawn between named points on the land territory. Apart from Norway, Iceland and Ecuador—both of whose assertions are contested—and Sweden use this method (see Johnson, "The Anglo-Norwegian Fisheries Case" (1952) *International and Comparative Law Quarterly*, p. 145, at p. 159, n. 25).

The United Kingdom did not oppose Norway's use of straight base-lines in all circumstances. She agreed that they were valid for denoting the closing lines of bays—"a bay in international law is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast"—and of all fjords and sunds, to which it was recognised that Norway had an historical title. The contention was that at some points on the coast, which could not be regarded as bays, straight base-lines were completely improper.

As evidence of its claim Norway cited a number of Decrees going back to 1812. This was to the effect that "in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea league from the island or islet farthest from the mainland, not covered by the sea"—which came to mean in Norwegian practice not "continuously" covered by the sea. This was followed by similar Decrees in 1869—which France contested—

and 1889, but all these related to an area south of that in dispute and appear to have been intended as internal administrative measures—in fact that of 1812 was not published until 1830. From the time that the dispute with the United Kingdom started in 1911, the latter protested at the various seizures and sought to ascertain exactly where the Norwegian lines ran, but it was not until the 1935 Decree that any demarcation was made. Nevertheless, the court had no difficulty in holding that Norway had over a long period virtually enjoyed sovereignty over the disputed areas, and that the title had been acquiesced in by foreign States. This Norwegian claim is undoubtedly an exception derogating from the general rule: the court pointed out that it was justified by the unique character of the Norwegian coast, while Judge McNair drew attention to the Hebrides coast and Judge Read to that of Canada; and by the economic condition of the inhabitants—the court was unconcerned with the possible economic ill-effects that would befall British fishermen excluded from their habitual fishing grounds.

Professor Lauterpacht has pointed out, in a critical analysis of the case which appeared in *The Times* (January 8, 1952), that " inasmuch as it may create, with some, the impression of a daring piece of judicial legislation in the sphere of the law of the sea and in disregard of the historic attitude of the main maritime Powers, it raises issues which transcend the economic importance of the problem before the court." It should not be forgotten that to establish a rule of law on geographical uniqueness and economic hardship appears to rely on special pleading and subjective legislation for hard cases. To substantiate it requires the clearest evidence of consistent practice and acquiescence. Nevertheless, as in the *Asylum Case*, while the dissenting judges examined in detail the historical background of the claim, the court satisfied itself with the barest evidence. The court merely referred to one early concession to fish in a named area, part of which was in fact outside the 1935 limits. In the view of the court " these ancient concessions tend to confirm the Norwegian Government's contention that the fisheries zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being . . . the principle of delimitation in force at that time. The court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of Lopphavet. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the court to have been

kept within the bounds of what is moderate and reasonable" (p. 142). Although the court may have been concerned with the moderation and reasonableness of the Norwegian claims, it had made clear in an earlier passage that it would not insist unduly on consistency or certainty: "Too much importance need not be attached to the few uncertainties, or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812 . . ." (p. 138).

It is not only the court's treatment of the historical background that is open to criticism. In every respect the paucity of evidence on which the majority decision is based is striking. As Dr. Schwarzenberger has pointed out in his recent paper on "Trends in the Practice of the World Court" (4 *Current Legal Problems*, 1951, p. 1, at p. 32), "the authority of the World Court (must) rest on the persuasiveness of its judgments and opinions. There is only one way to achieve the optimum that, in this respect, can be attained : the fullest and most cogent reasoning. It is probably not accidental that the least convincing statements made by the International Court of Justice excel by a remarkable economy of argument."

These criticisms of the judgment should not be taken to imply that the court conferred complete freedom upon Norway in establishing her base-lines. The court established three considerations which should be applied. "Base-lines must not depart to any appreciable extent from the general direction of the coast"—Judge Hsu Mo maintained that the permitted deviation must not be unduly liberal, while the court took the line that a liberal interpretation was to be applied, thus including Svaerholthavet and Lopphavet, neither of which Judge Hsu Mo nor the dissidents regarded as bays nor consistent with the "general direction of the coast." Secondly, "the real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the régime of internal waters," another principle which the court felt should be liberally interpreted in the case of Norway. Finally, due consideration should be taken "of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage"—a subjective test which, if generally applied, could lead to the negation of most principles of law.

According to Art. 59 of the Statute of the World Court a decision is authoritative only on its own facts and for the parties to the particular issue. Strictly, it lacks all precedent value. It cannot be doubted, however, that, although it might be argued that the court was applying special rules to a special set of circumstances, other States will hasten—as Iceland has already done (*The Times*, May 5, 1952)—to apply similar base-lines to measure its own

territorial belt, for, as Sir Arnold McNair pointed out, it becomes somewhat hypothetical to conceive of any "principle or rule of law which allows a wider belt of territorial waters to a country possessing a mountainous coast, such as Norway, than it does to one possessing a flat coast, such as the Netherlands" (p. 171). Not only does the judgment not assist in finally delimiting territorial limits, but if generally applied it will make confusion more confounded and territorial waters will vary from coast to coast. The decision is in line with the modern tendency—somewhat strange in an age which expresses belief in international co-operation and inter-dependence—to whittle down the principle of the freedom of the seas in favour of coastal States, a principle which is already constantly asserted in connection with the continental shelf and rights to the resources of the sea, the seabed and its subsoil (see the writer's "The Continental Shelf" (1951) 4 *Current Legal Problems*, p. 54, at pp. 71 *et seq.*). If the matter is left to go uncontrolled the assertion in the Individual Opinion of Judge Alvarez, with all that it implies, may well become true : every State "is entitled, in accordance with the general principles of the law of nations now in existence, to determine not only the breadth of her territorial sea, but also the manner in which it is to be reckoned" (p. 153).

This trend towards subjectivity is not, unfortunately, confined to problems concerning territorial sovereignty. The decision lends further weight to Dr. Schwarzenberger's comment that "the synopsis of majority and dissenting opinions in any single case before the court provokes a . . . disturbing reflection. By the choice of the appropriate major premises and methods of treaty interpretation, every single case might have been decided in the opposite way" (*loc. cit.*, p. 31). Should this tendency become too marked, the court may well find itself the chief sufferer from its somewhat quixotic expositions of international law.

L. C. Green.

Erratum

In the note on "Common Mistake," pp. 229 *et seq.*, the reference at p. 229, line 12 from the bottom of the page should be to section 6, not to section 7, of the Sale of Goods Act. The words "to the knowledge of the seller" in lines 9 and 8 from the bottom should be replaced by "without the knowledge of the seller." We are obliged to Mr. A. M. Honoré, of Queen's College, Oxford, for drawing our attention to this regrettable error.

Editorial Committee.

REVIEWS

THE REFORM OF THE LAW. Edited by PROFESSOR GLANVILLE WILLIAMS. [London: Victor Gollancz, Ltd. 1951. viii and 216 pp. 18s.]

THIS collection of independently written chapters on Law Reform is edited and (one suspects) in part written by Professor Glanville Williams. Graced by an erudite and brilliant editor, it would be impossible for the work to be devoid either of value or of interest. It is disappointing that the selection of his collaborators was restricted to lawyers of one political colour, although this was inevitable since the work was prepared by the Haldane Society—in its erstwhile shape and before the Society of Labour Lawyers was established as a rival organisation. Nevertheless, although deprived of contributions from the "bluer" pens, there is a fine muster of names adjoining the title page, and the notification that portions have been contributed by Lord Chorley, the late Professor Harold Laski and Dr. Mannheim is itself enough to encourage high hopes of an exciting and provocative book—hopes which, alas, are by no means fully realised.

The object of the book, in the words of its sponsors, is "a contribution towards the development of the law which may assist progressive opinion in considering and furthering practical legislation." This object is not, however, advanced by its failure to reveal for what type of reader it is intended. To a lay reader, portions of the book are far too technical since they presuppose a knowledge of the law to understand them. If the book is intended for lawyers, then many portions are insufficiently argued or reasoned so that the reader, not already convinced that a particular change or reform is necessary, is furnished with little or nothing to persuade him to a more "progressive" viewpoint.

But the primary fault of this book is that it is entirely lacking in shape. The method of synthesis employed in writing the book, by using a considerable number of authors of varying degrees of learning and distinction, could only achieve success if they had been required to work to a stringently imposed plan, and had been subject to strict editorial supervision in fulfilling that plan. It is abundantly clear that in fact only the loosest possible plan was devised, whereby each author was to deal on a particular subject with what either he or the editor conceived to be appropriate for law reform, and that no real thought was given to the precise extent of the legal topics which are appropriate for reform *through the intervention of lawyers*. In the result, the book is a hotchpotch of proposals relating to a diversified number of topics, many of which are entirely outside the scope of "The Reform of the Law" in so far as the reform of the law is a matter for lawyers. It is perfectly true that lawyers have as much right to express their opinion on topics relating to stage censorship; the freedom or control of aliens; the law relating to prostitution; cruelty to animals; and current morality in regard to divorce, as any other section of the community, but it should have been clear to those responsible that by embracing the whole sphere of social and political controversy, they were largely defeating the purpose of the book and exposing its contributors to a scrutiny of their qualifications on these particular topics which leaves some of them in a highly vulnerable condition.

The sponsors of the book will, no doubt, vigorously contend that it was not their intention to restrict themselves to purely technical matters, to which the unhesitating reply must then be given that it is impossible to deal with the subjects they have endeavoured to cover within the scope of a relatively short book, and that a work which had restricted itself to the type of legal

reform which is within the special knowledge of lawyers would have been infinitely better argued, infinitely more persuasive, and infinitely more valuable.

As a result of the effort to crowd such a variegated collection of topics into one work, each topic has necessarily been dealt with in a sketchy and inadequate fashion. In the majority of cases, the reformer contents himself with the dogmatic assertion that a particular rule or institution is wrong and should be changed. There is rarely a presentation of any argument to the contrary, and one is left with the entirely fallacious impression that each one of the proposals put forward is self-evident, and that there is nothing whatever to be said on the other side.

Illustrations abound of this summary, and in many cases unfair, treatment of existing institutions. The writers of the book, not unexpectedly, are in favour of a fusion of the two branches of the legal profession and a consequential abolition of the distinction between Leading and Junior Counsel. This matter has been the subject of considerable discussion over many years. The present reviewer, a wholehearted supporter of "fusion," cannot feel that the cause is given any powerful aid by its presentation here. To set out the proposal without any reference to the case which can be made against it on the score of maintaining the aloofness of the Bar and the high degree of specialisation which is achieved through the present division, serves little purpose save to provoke irritation.

Similarly, the arguments for the retention of Queen's Counsel are nowhere presented. All practitioners will be acquainted with the immense benefit of having a counsel engaged in the case who need not concern himself with the details of pleading, apart altogether from the attractive professional feature of allowing a man to graduate, when he attains a sufficient degree of eminence and experience, to a type of work which is free from the worry and irritation of Chamber Summonses, drafting, and the like. These arguments can almost certainly be offset by the serious detriment to the litigant in regard to expense and in other ways, but they should at least be presented.

Moreover, the authors, in their determination to be as thoroughgoing and revolutionary as possible, occasionally produce proposals which by now they may well wish to retract. Possibly, the most flagrant of these is the suggestion that the upper limit for a brief fee in a civil case should be thirty guineas. How anyone acquainted with the practice of the law could suggest that this sum could be a proper remuneration in a heavy action, which might involve weeks of preparatory work and the study of innumerable authorities, passes comprehension. Here again failure to state the other side of the case vitiates a very large part of the proposals put forward. The whole spirit of the book is one of quite ruthless iconoclasm and it is shot through and through with a determination to ensure that the baby, the bath and the bath water are all permanently jettisoned.

It may not be unprofitable to subject one of the better chapters in the book to a brief analysis. The law of contract and tort is dealt with in some sixteen pages. The first few pages are concerned with the proposals of the Law Revision Committee in relation to the doctrine of consideration, and set out in some detail matters about which there will be little general disagreement. The author then finds, no doubt, that his space is thereafter heavily curtailed, and proceeds to make a number of other recommendations. Accordingly we have one sentence, "The law relating to the contracts of infants (minors) is in a most confused and unsatisfactory state": it would be interesting to know what the author objects to in regard to the law relating to minors but, since he declines to tell us, we must forever remain in a state of speculation. In the respectful view of the present reviewer the law relating to infants' contracts could be a great deal worse both in principle and in application. If a committee were to sit down for a very considerable period of time to devise a new set of rules *ab initio,* it is unlikely that they would

reach any very different conclusions than that a minor should be liable under contracts for "necessaries"; that otherwise, as a general principle, the contracts of a minor should be unenforceable, unless ratified after attaining full age; that certain contracts should be void; and that contracts which are demonstrably for the benefit of the infant should be enforceable.

There is a similar assertion that the law relating to wagers is unsatisfactory. On this topic there is profound agreement, but nothing whatever is stated as to what the law relating to wagers is or how it should be reformed, nor is any indication given of the extraordinary complexity and difficulty of the subject and the terrifying cleavage of public opinion in regard to all matters of betting.

Later in the same chapter, there are suggestions for reforming the law relating to conditions contained or referred to in a ticket, but so far as the present reviewer can see, the proposed reform corresponds very closely to the existing law.

Again, we are told, "Our law of quasi contract lags far behind the systems that derive from Roman law." We are not, however, told that the Roman law of quasi contract fits in with the structure of the Roman law of contract and will not fit in with the common law structure. In some years of experience, the present reviewer has never felt the need for the introduction into English law of the well-meaning busybody designated by Roman law as the "negotiorum gestor," and the suggestion that such an institution is necessary lacks any illustration to support it. It is at least open to argument that the unsolicited intervention by one person into the affairs of another should be at his own risk and cost, unless his actions are adopted by the intended beneficiary. Similarly, there is a bald assertion that "a remedy should be given for money paid under a mistake of law," without any reference whatever to the value of the existing rule.

One can multiply these instances of unsupported statements without argument or reasoning, far beyond the space that is extended to this review. We are asked to abolish the action for breach of promise of marriage, although it must be clear even to those who have conscientious objections to this type of action (principally males) that there are cases where the gravest possible injustice would be perpetrated if some remedy did not exist, and no reference is made to the special rule of evidence with regard to corroboration, which is designed to avoid the exploitation of this type of action for blackmail purposes.

We are urged to introduce a fresh tort recognising a right of privacy, which is an odd recommendation when most practitioners in the cognate field of defamation (including the very authors of this book) are concerned to secure some relaxation of the stringent rules of libel which at present prevail, and no word is uttered about the serious encroachment on the liberty of the press that would inevitably follow.

A similar divergence of view between two contributors (or in this case it may even be the same contributor) appears at page 74, where there is a bitter complaint that the law is weighted in favour of insurance companies because of the high duty of disclosure imposed on the insured, followed by a milder grumble on page 76 that "English law knows no duty of care to make proper disclosure to the other party to a prospective contract."

Again, the rule requiring the prosecution for felony before a civil action is brought for damages is attacked, but its salutary purpose is neglected, and no indication is given of the very limited scope of its operation in view of the absence of any similar rules in regard to misdemeanours. A reference is made to *Re Polemis*: while a strong case can be made out in logic for the principle enunciated in this case, the authors of this book give no indication of the nature of this principle, and the lay reader will simply be left with the impression that it reflects some peculiar iniquity of the legal world against which he should rightly inveigh.

The vice of introducing political considerations into a work of this type is well evidenced by the chapter on civil liberties, which is entirely concerned with a consideration of the position of aliens and of theatre and cinema censorship. It is really little short of a disgrace that lawyers dealing with their own system of law should fail to convey to the outside world the elaborate protections and safeguards (operating for citizens and aliens alike), which are unequalled in the English system for the protection of human liberty, and should be satisfied to leave an impression that this branch of our law is as unsatisfactory as every other branch to which they have referred. It is pathetic, however, that when dealing with this topic, no reference should be made to the serious encroachments on the liberty of the subject (whether for good or ill) which have been introduced during the last few years and that the whole concern of the writers should be focused on so narrow a field. Why the hoary topic of theatre and cinema censorship is introduced it is difficult to understand. The present reviewer has a reasonable knowledge of the operation of theatrical and cinema censorship: it is doubtful whether there is any feeling today that the liberal and emancipated exercise of the Lord Chamberlain's powers is a burning matter for change. In fact, had the writer of this particular section been a theatregoer of experience, he could very easily have satisfied himself that there are very few topics suitable for adult discussion which are banned for public presentation on the English stage. It is true that where plays deal with sexual perversions, the Lord Chamberlain still maintains an attitude which the authors may regard as old-fashioned, but it is difficult to impeach his office on that solitary score and the matter has a quaint Edwardian flavour. There is, of course, graver objection to be taken to the British Board of Film Censors, but its inadequacies and anomalies are those of an industry which respond to an "Alice in Wonderland" direction and which could hardly have been dealt with if the whole book had been devoted to the fascinating subject.

An intriguing feature of the book is in the instances of suggested reform, which provoke an immediate and hitherto unsuspected partiality for the institution which is being tilted at. Illustrations could be multiplied but a few must suffice. At one place, the writer becomes almost eloquent in denouncing the English rule that (except in certain cases) an unlawfully deprived owner can recover his property from an innocent purchaser. Since such a case necessarily involves hardship, the present rule seems just and fair and sensible and the suggested reform to propound a Burglars' Charter. On any footing it is hardly a matter of crying importance in law reform. At a second place we are told that "there is no duty of care to prevent animals straying on a highway," with the inference that there should, of course, be such a duty. One is prompted to ask "Why?". At a third place, it is proposed that "jurisdiction to make separation orders should be transferred from magistrates to the county court." No reason is given for the proposal and one is left to suppose that the author's desire is to ensure that in such matters a trained judge rather than a lay magistrate should adjudicate. But this surely is an argument in favour of stipendiary magistrates or in favour of transferring the entire function of lay benches to trained lawyers.

To sum up, a somewhat tepid welcome can be extended to this book in regard to its intentions. It has largely failed to fulfil those intentions and in some respects it has done a positive disservice to them by professing to have dealt with matters which call for more careful, thoughtful and mature consideration. The worst fault of the book is the general atmosphere it seeks to create, that English law is, by and large, in a doleful plight, needing the healthy remedies which can only be administered by left-thinking progressives. It would, however, be unfair to imply that some portions of the book are without considerable merit. The section on Landlord and Tenant is carefully explained and sensibly argued. Again, nothing but praise can be extended to the proposed reforms in our ridiculous laws of evidence and the

condemnation of the McNaghten rules conforms with the feeling of every humane person—although once again the immense difficulties of this subject are largely scouted.

The reviewer has not dealt with the main theme of the book—or its professed main theme—which is the establishment of a Ministry of Justice. At this stage, he can only heave a heavy sigh at the naïveté which considers that the establishment of an additional Ministry is the universal panacea. It is not the Ministry of Justice which will achieve any object, but the Minister, and if suitable persons exist to undertake such reforms as are admittedly necessary they will attain their end without elaborate changes in the administrative framework of the law. While many of the contributors cast envious eyes at institutions in other systems of law, they might be well advised to look to the operation of law in other countries to recognise some of the horrors from which the English system has spared us and the transcendant blessings of judicial tradition and impartiality as fostered by the English common law. They need not go farther than the lists of their own publisher to read, for a start, *Murder, Inc.* (an unbelievable record of a nationwide gang of thugs and assassins in the U.S.A.); *Crime in America*, an account by Senator Kefauver of the proceedings of his Senatorial Committee; *Courtroom*, a biography of Sam Liebowitz, an outstanding American criminal lawyer, who for a time defended the Scottsboro negroes; and *Scottsboro Boy*, the tale of one of those negroes. One may not learn how satisfactorily the doctrine of consideration operates in America, but even the most determined progressives may get an inkling that there are perhaps more significant aspects of law reform even than the doctrine of consideration.

A. GOODMAN.

APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS. By JOSEPH HENRY SMITH. [Columbia University Press: London: Geoffrey Cumberlege.]

THIS is one of the publications of the Foundation for Research in Legal History of the Columbia University School of Law. It deals with the appellate jurisdiction of the Council, as I propose to describe the Privy Council or the Committee of it which dealt with appeals, from the late seventeenth century until the Peace of Paris in 1783. It is a long book, running into more than 600 pages, thorough, authoritative, and interesting. Mr. Joseph Henry Smith, the author, has spared no trouble in his researches, which have comprised England, the States of the Atlantic coast, the Channel Islands, and Jamaica, and he is to be congratulated on the combination of industry, patience, and insight, which his book displays.

In his first 40 pages he deals with the appellate relations between the Crown and the Channel Islands. The islands are part, and a small part, of the original overseas dominions of the Crown. In the latter part of the seventeenth century they were the only part which still remained within the Crown dominions, where they have continued until this day. Mr. Smith speaks with unsurpassed authority on the history of their legal connection with the Council up to 1783. The elements of an appellate system and jurisprudence between the Council and the islands had begun to assemble themselves over a long period of years before the end of the seventeenth century and proved to be of service when it became necessary to develop appellate relations between the Crown and territories across the Atlantic far exceeding in size the whole of the original overseas dominions. It is impossible to enter into detail here about the relations between the Channel Islands and the Council. It is not a dull story. There is a good deal of human interest in it. I confine myself to mentioning one curious result of this appellate relationship, *viz.*, that it

led to some meetings of the Council being held outside England. For the purpose of hearing appeals the Council between August, 1649, and February, 1650, met at St. Germain in France, and also in Jersey at St. Helier and at Elizabeth Castle. Charles II was in Jersey from September, 1649, to February, 1650, and the castle was his residence and he is reported to have been present himself at the Council when it met there. I may add that about the same date English Prize Courts also were set up out of England. Hoskins in the second volume of his *Charles the Second in the Channel Islands* (London, 1854) at pp. 105–106 says that the French local authorities were commanded by Louis XIV in or about 1647 to give every assistance to Royalist captors of English vessels, and then adds "Admiralty courts, legalising, after a fashion, the condemnation of prizes, are established in various places." He names one such port, Cherbourg, and says that "Captain Percy, an Irish loyalist," presided over the Prize Court there.

Out of the many interesting and important topics, which Mr. Smith discusses and illuminates, it is necessary for reasons of space that I should select a certain number and confine my observations to them. I begin with a question which arose as regards the chartered colonies towards the close of the seventeenth century. Was there a right of appeal from the Colonial courts to the Council, if no such right of appeal was reserved in the charter? The view of the Council was that the Crown had an inherent right to receive such appeals, although no reserving words to that effect were contained in the charter. The controversy, however, still persisted. In 1705 a Bill was introduced in the House of Commons which provided that appeal should be allowed from the chartered colonies as from the royal colonies, but Sir Henry Ashurst, the agent in London of Connecticut, reported that he "made such interest against itt with some of the leading men of the House, so that itt was thrown out att the first reading." There was a proposal to introduce similar legislation in 1752, but no action was taken upon it.

Other problems arose upon the point, whether, assuming that there is a right of appeal and that the appeal is brought in time and that the requirement that no appeal can be brought unless it involves at least a certain minimum sum has been satisfied, an appeal will lie from all judgments or only from some and whether the form of the judgment affects the extent or the nature of the right of appeal. One of these problems, which gave rise to much controversy, was as follows, *viz.*: If the verdict of a jury is a general, not a special, verdict, how far can or will the Council interfere with it? In dealing with this complicated question I shall assume that no Bill of exceptions is involved. The question was important for this reason. Assuming that there was no right of appeal from a general verdict, a colonial jury, who wished to vindicate the claim of colonial courts to be final judges of colonial affairs or who were zealous to prevent any diminution of jury prerogative, would incline to find a general, and not a special, verdict. If the verdict was general, the jury took the law as stated by the judge, found the facts, and applied the law to the facts. If the verdict was special, the jury found the facts, and then left the final determination to the court according to the views of the court upon the law and the application of the law to the facts as found. Mr. Smith sets out the various decisions, which have a bearing on this problem. Stating the matter broadly, the Council seem to have acted as follows. They did not act on the principle that they would not entertain appeals from a general verdict at all. They tended to act on the basis of the rule which was specifically stated by the courts at Westminster in 1757, *viz.*, "a general verdict can only be set right by a new trial," and, if they were of opinion that the appellant, who was appealing from a general verdict, should have won in the court below, they did not enter judgment for him, but only sent the case back for a new trial. The reasons for this rule seem to be that if the appeal tribunal should enter judgment for the appellant, they would be invading the province of the jury and further that the record sent up to the

appellate tribunal in the case of a general verdict would not normally set out all the evidence which had been given at the trial. If the verdict was special, the Council might reverse the lower court and might give the judgment which ought to have been given below. Another problem arose from instructions sent by the Council in December, 1753, to the Governors of colonies that the Governor on application being made should "permit and allow appeals from any of the courts of common law" in the province to the Governor and Council, *i.e.*, the colonial Council. Up till then such instructions had usually provided for these appeals "in cases of error," but those four words, which referred to the well-established common-law method of appeal by writ of error, were conspicuously absent from the instructions of December, 1753. Did the Crown by these instructions, which did not contain those four words, intend to establish a new method? Was this a proposal to give jurisdiction to another court to examine a jury's findings of fact and so to destroy the long-established rule of English law that the verdict of the jury on the facts was final? The point came up in the Supreme Court of New York in 1764 (I quote Mr. Smith) "in an episode which shook the province." The repercussions of it were felt through the States along the Atlantic coast. The name of the case was *Forsey* v. *Cunningham,* and it arose upon an action for assault, battery, and wounding committed in 1763. The jury assessed the damages at £1,500 and the costs at sixpence. An attempt was then made to bring an appeal not by writ of error but by a new kind of writ based upon the new instructions. The Supreme Court declined to entertain it and rejected the interpretation of the instructions, upon which it was based. The matter was before them again in November, 1765, and they then declared that the law knew of no appeal from a verdict, and the case came to an end. If the times had been more propitious the Council would perhaps have done something to achieve a final solution of these and other problems of appellate procedure, which were bound to arise, as the stream of appeals continued to flow.

Another controversial matter was the question, how far English statutes applied to the colonies. The controversy led men or at any rate lawyers into much cogitation upon *Calvin's Case* (1608) which had been argued in the Exchequer Chamber by many distinguished lawyers. Sir Edward Coke in his report of it had assumed, *e.g.*, in his observations about the Channel Islands, the distinction between the realm and the dominions of the King not parcel of the realm, and had also distinguished between territory conquered from a Christian king and territory conquered from infidels "whom the law presumed to be perpetual enemies." He had also pointed out that in the case of a distinct dominion Acts of Parliament might bind by express reference. Then in 1722 the Council through the Master of the Rolls published the so-called "Privy Council Memorandum" about the reception of English law in newly settled countries. Amongst other things it was there declared that a new and uninhabited country discovered by English subjects was to be governed by the laws of England, but, after it was inhabited by the English, Acts of Parliament not naming the plantations would not bind them. As this declaration was printed in the second volume of *Peere Williams'* reports, which were used and esteemed on both sides of the Atlantic, it became widely known and presumably achieved a considerable influence also. The controversy was prolific and branched out into many questions, *e.g.*, what regard should be paid to the distinction between statutes affirming and statutes altering the common law or between statutes passed before and those passed after the date of the settlement of a colony? There were currents and cross-currents of opinion. I mentioned above the statement in the "Privy Council Memorandum" as to any Act of Parliament passed after the settlement of a colony, that it did not apply to dominions of the Crown unless it specially mentioned them. The colonists would not tend to emphasise that maxim, if they wished to argue that the benefits of the Habeas Corpus Act of 1680 (31 Car. 2, c. 2) extended to the colony, but they might tend to emphasise

it, when they wished to claim as wide a scope as possible for the exercise of legislative powers by their own colony. The Statute of Frauds of 1677 (29 Car. 2, c. 3) had a somewhat remarkable history in Jamaica as regards this issue of applicability. The courts of Jamaica decided in 1709 in *Orby* v. *Long*, a case about a will, that the statute applied in Jamaica, and in 1710 the Council reversed this decision, holding that the statute did not apply there. But the island did not intend to abandon its claim to the application of the statute and in 1722–23 passed an Act declaring various English statutes, including the Statute of Frauds, to be law in Jamaica. This Act was disallowed by the Council. When in the following January a judgment of the lower court in Jamaica which proceeded upon the basis that the statute applied in the island was carried to the Court of Error and that court had to decide whether it did so apply or not, it was evenly divided, and the judgment of the lower court was therefore confirmed.

An important constitutional question was much controverted, *viz.*, the question of the right of the Council to review the validity of colonial legislation. Section 9 of a statute of 1696 (7 & 8 Will. 3, c. 22) provided (in effect) that, if any "plantation" passed a law repugnant to the laws of England so far as they related to the plantation, that law should be illegal, null and void. Two forms of declaration were developed in the course of the application of the statute, one declaring the colonial Act void *ab initio* and the other disallowing it as from the date of disallowance. Declarations were made in both forms and the normal course was for the Council to make them in non-judicial proceedings. A declaration of voidness *ab initio* was made judicially by the Council in the case of *Winthrop* v. *Lechmere*, which is one of the most famous of the appeals from the American colonies in the eighteenth century. Several colonies did not wish to maintain the distinction between realty and personalty in the rules of devolution upon intestacy which was established in English law, and preferred that the rules in respect of realty in that event should be the same as the rules in respect of personalty. The colony of Connecticut in 1699 passed an Act which gave effect to such a preference. The colony of Massachusetts had passed a similar Act in 1692. The Connecticut Act came before the courts in *Winthrop* v. *Lechmere*. The litigation began in 1724 and in December, 1727, the Council declared against the validity of the Act and allowed Winthrop's appeal. That, however, did not conclude the matter, and the English authorities seem finally to have (I quote Mr. Smith) "capitulated to the colonial view on intestate succession." The Crown sometimes issued instructions requiring certain clauses to be included in a colonial Act, *e.g.*, a suspending clause which said that the Act was not to come into force until it was approved by the King in Council. Mr. Smith has found many instances of disobedience to these instructions and of resulting disallowances, but there seems to be no instance of such disobedience leading to a declaration that the colonial Act was void *ab initio*. Disputes about annulling and disallowing continued into the years when the onset of the political storm between the Crown and the American colonies had become plain. Indeed a man may have gone to the Council and seen Lord Mansfield sitting there and heard some argument about constitutional law in an appeal from the colonies, and the same man may have gone to the House of Commons, where a debate was proceeding about American discontents, and listened to Burke entreating his fellow-members to remember that magnanimity in politics is not seldom the truest wisdom.

The reader who brings some imagination to his reading of the text and of the notes of this book will form for himself an interesting picture of the circumstances of these appeals to the Council, especially in the eighteenth century. Each party submitted to the tribunal copies of a printed "case" signed by counsel. It was ordered by the Council in 1730 that no printed case should be delivered to the Council unless one or more of the counsel who were to attend the hearing had signed it. The solicitors of the parties did

not merely hand the "cases" to some official of the Council for distribution but delivered "cases" to the Lord President and to such Law Lords as were likely to attend the hearing. Charges by solicitors for this work are found in the Appendices to this book. The members of the Council who heard the arguments tendered a report or advisory opinion to the King in Council, and it seems that the ground for their advice did not usually appear on the report. Hearings before the Council took place in the Cockpit, which was near the site of 10 Downing Street. They were public, but they were not reported regularly, until Jerome W. Knapp began his reports in 1829. Across the forensic stage, which the book sets before us, there pass some memorable figures of the Bench and Bar, *e.g.*, William Murray, who became Chief Justice of the King's Bench in 1756 and Earl of Mansfield, Charles Pratt, who became Lord Chancellor in 1766 and Lord Camden, and John Willes who was Lord Chief Justice of the Common Pleas from 1737 to 1761. We meet too Francis Maseres, who was Attorney-General for Quebec for three years and then returned to London and became Cursitor Baron of the Exchequer. I ought perhaps to say that we meet him again, for we have met him before in Lamb's essay on "The Old Benchers of the Inner Temple" and in one of Lamb's letters to Manning. Mr. Smith introduces us also to an interesting and important body of men, the agents of the colonies in London, accredited (as it were) on behalf of the colonies to the Council and the departments of State, *e.g.*, Paris, Bollan, Charles, Partridge, and three of the agents for the colony of Connecticut between 1700 and 1770, Sir Henry Ashurst, Francis Wilks and William Samuel Johnson. None of them takes up more space in the Index than Ferdinand John Paris, who was agent for New Jersey and acted at least once for a client in the older Jersey on the other side of the Atlantic from which the American colony derived its name. He was briefed on the side of the clergy in the great Virginian cause of *Camm* v. *Hansford,* which came to pass because the colony enacted that the payment of clerical salaries, instead of being made in tobacco, might be made in money. The clergy lost their appeal, but none the less they are reported to have "maintained that the action could not have been better laid being done so at the advice of learned and astute Ferdinand John Paris." The praise of a client who had lost is praise worth having. There are interesting glimpses of the activities of the agents. They took counsel with one another and arranged to act together, as the turn of events might require, in the protection of colonial interests. It was, no doubt, part of their duty to disseminate information, geographical and other, about the colonies. Johnson records that he heard in Westminster Hall "a respectable counsellor at law ask Mr. Jackson gravely . . . whether Philadelphia was in the E. or W. Indies." I take Mr. Jackson to have been the agent of that name, whom Mr. Smith mentions, and he no doubt contrived a form of reply which tactfully removed the misapprehension of his learned interrogator. The agents kept in close touch with important people. Ashurst, for example, seems to have been on friendly terms with both the law officers at the beginning of the eighteenth century. We have to thank Mr. Smith for an interesting as well as a learned and an instructive book.

C. T. Le Quesne.

Law in the Making. By Carleton Kemp Allen, M.C., Q.C., D.C.L., F.B.A., F.R.S.L., J.P. Fifth Edition. [Oxford: Clarendon Press. 1951. 35s. net.]

In the preface to the new edition, Dr. Allen confesses to a pleasant surprise that *Law in the Making* is still going strong after 24 years. To the many users of Dr. Allen's book this is not so surprising. It is not only Dr. Allen's felicitous and easy style which makes him carry his learning more lightly

than is the case with most of his fellow writers on this subject. The book also has a quality which appeals particularly to the English lawyer. Its approach is historical, and the theoretical discussions about law and its sources are discursive and inductive rather than fundamentalist or deductive. The book is permeated by a firm belief in the traditional English approach to legal problems, while being critical, and at times devastating, about the deficiencies both of the legislative and judicial process.

The present edition has remained unaltered in approach and scope, but the material has been thoroughly revised. The illustrations in the long chapter on Precedent consist now to a large extent of very recent decisions. Dr. Allen has also dealt with various recent writings, for example, on statutory interpretation and delegated legislation. None appears to have led to any modification of Dr. Allen's well-known views on these topics. The place of this book is now so assured, the appearance of future editions so certain, that a reviewer can perform a better service than that of the usual eulogy. The present reviewer has learned much of his English jurisprudence from *Law in the Making*, and he has also used it as a teacher of jurisprudence in different common law jurisdictions. It is, therefore, with a sense of respect and gratitude that he submits some criticisms. They are of two kinds. Some concern certain deficiencies of the book, granted its own premises; others are concerned with the major premises underlying Dr. Allen's approach to certain vital problems of jurisprudence.

The book is mainly concerned with the four major sources of English law: custom, precedent, equity and legislation. In the third edition, Dr. Allen first prefaced it with a short introduction to legal theory called "Law and Its Sources." Except for some references, the introduction is still the same, and the present reviewer's respectful opinion is still that it lessens the value of the book. A discussion of certain problems of sovereignty, and their bearing on the sources of law is indeed apposite. A discussion of such writers as Austin, Kelsen, Duguit, and perhaps Savigny and Ehrlich, would, therefore, make an organic introduction to a book concerned with the sources of law. But Dr. Allen has added to it a selection of writers and theories concerned with the ends and purposes of law. The result is 60 pages of an elementary discourse on certain aspects of legal theory, which can hardly satisfy anybody, especially as, contrary to the author's general approach, this section of the book is strongly tainted by his personal predilections and antipathies. The discussion of Kelsen—probably the most over-dissected jurist of our time—is certainly lucid and stimulating, although Dr. Allen's slightly condescending assumption that the English lawyer is not "prone to confuse the legal and the political" and that "nothing is more repellent to Anglo-Saxon legal instinct than the corruption of law by political ideology" is perhaps a trifle naïve. Dr. Allen still adheres to his view that the Grundnorm is the weakest part of Kelsen's doctrine because you cannot, for example, easily find out who is the sovereign in the United States. As has been pointed out before, the fact that in a particular political society sovereignty is divided between different organs of the constitution does not in any way affect the thesis that there is an ultimate assumption underlying each legal system which is not itself capable of proof or deduction. In that respect, Kelsen's theory says in abstract terms exactly what Holmes, Cardozo, Stone and other eminent American judges have taught and practised in the United States.

It is greatly to be deplored that Dr. Allen has not found it necessary either to omit or to revise his four pages of "Realistic Jurisprudence," which, it is submitted with the utmost respect, are not in keeping with the general standing of the book and the author. Dr. Allen does not consider it necessary to quote any of the writers or theories which he attacks, except for a reference without name to one passage in Frank's *Law and the Modern Mind*. Dr. Allen obviously formed his view of the realists in the early 1930's, and has never followed their work any further. The realist movement is certainly

not easy to classify, because it represents little more than a general way of thought based on the philosophy of James and Dewey. Moreover, its predictions were often extravagant in their attack both on the analytical and teleological jurisprudence. For all that, the realist movement is an essential part of American life and thought; it has produced a great deal of provocative and searching writing, and at least some works of classical standing. Among them are Thurman Arnold's *Symbols of Government* and *Folklore of Capitalism*, Jerome Frank's *Law and the Modern Mind*, and Berle and Means' *Modern Corporation and Private Property*. The influence of these works on modern legal thinking has been decisive. The realist movement, as a whole, represents characteristic American virtues and weaknesses: extravagance and some bombast, together with remarkable vitality and freshness of thinking, and an urge for experimentation. The English and American approach to legal problems is in many ways very different, despite their common background. Mutual understanding between them has never been more necessary. Dr. Allen's four pages on realism would be taken by many as representative of modern English jurisprudential thinking, and this is a great pity.

As regards the introductory section as a whole, I respectfully submit that, short of a fuller treatise on legal theory, which would probably not fit into the scope of the book as a whole, Dr. Allen might confine it in future editions to a discussion of the relation of sovereignty and the law.

It is with relief that one passes from the introductory chapter to the main sections of the book, with their extremely high standard of scholarship and discussion. The chapter on Precedent, which has been largely rewritten, is still characterised by the author's felicitous blend of mastery of detail with a balanced presentation of the major issues behind it. In the present as in the previous editions, I have always felt that the chapter would gain by greater conciseness. In particular, the final section on the practical working of precedent seems in many ways to be an unnecessary repetition of the first section. In both, the extreme practical difficulties of the principle of *stare decisis*, the conflict of authorities, the difficulties of distinguishing a dictum from the *ratio decidendi* are brilliantly demonstrated, but the material used and the conclusions reached are practically the same. The effect of this repetition is an anti-climax. Despite the now overwhelming evidence of the difficulties of the analytical precedent doctrine—which nobody can demonstrate more brilliantly than Dr. Allen—he remains convinced that it is still by and large the best system for the development of English law. This goes together with Dr. Allen's view that "if Parliament has to intervene in the development of the law, it should intervene as little as possible" (p. 479). Such a phrase is, of course, capable of most divergent interpretations, but even from the author's point of view, it depends entirely on the judges taking a view of their function which very many judges do not take: that they should use the many gaps, inconsistencies, contradictions, which leave a choice of alternative solutions for the development of the law, in order to adapt it to changing social needs and problems, within the limits set by the decision of a particular case. But it seems that at this point Dr. Allen refuses to think further. He is torn between his reverence for the time-honoured methods of English law-making—coupled with his belief that English judges are normally free from prejudice—and his analytical conclusion that the development of the common law becomes stultified, and large scale legislative interference indispensable, if the judges refuse to develop the common law creatively. Hence, the reading of the present edition, as of former editions, leaves the critical student with a feeling of inconclusiveness and dissatisfaction. This is not because any of us knows all the answers. It is because Dr. Allen refuses to face the problems of the judicial process in the way in which the greatest of the American judges and at least one of the contemporary English judges face them. His choice, as well as his interpretation of decisions reflects this

approach. Dr. Allen constantly attempts to explain imperfections of the precedent system by technical reasons, by difficulties in distinguishing between ratio and dictum, by ignorance of relevant precedent, by the difficulties in following conflicting but equally binding authorities, and so on. He hardly ever hints that there is a basic conflict of philosophy, no less acute in England because it is more concealed than in countries where the courts have political instruments to interpret, and where they, consequently, are used to facing conflicts of political philosophy in legal disguise. There has, for example, been a radical difference of approach between the present House of Lords and that in which Lord Wright and Lord Atkin played a large part. From the early 30's to the middle 40's the House of Lords exercised a decisive influence on the adaptation of many branches of the law to new social needs. The majority of its members then believed in the common law as a growing organism which had to develop side by side with the action of the legislator. The philosophy of the present House of Lords is that of emphasising traditional categories, however meaningless in modern times, and of refusing to use the many ways of creative development, which Dr. Allen so ably discusses, for the rationalisation of law. Strangely enough, Dr. Allen quotes Lord MacMillan's dictum in *Birch* v. *Brown* [1931] A.C., but not his more recent and radically different dictum in *Read* v. *Lyons* [1947] A.C., in which he denies that it is a task of Her Majesty's judges to help in the rationalisation of the law in England. Dr. Allen himself has criticised the decision in *Liversidge* v. *Anderson*. He has missed a wonderful opportunity in not contrasting the reasoning in that case with the reasoning of the House of Lords in *Roberts* v. *Hopwood*. Had he done so, he might not have been so complacent about the absence of ideology in the decisions of English courts. Dr. Allen rightly criticises the more extreme assertions of prejudice made by such writers as Jennings or Laski in their earlier writings, but he refuses to mention or discuss the decisions which at least emphasise the problem.[1]

Problems of statutory interpretation are closely related to the theory of precedent. The whole tenor of Dr. Allen's argument is pessimistic. The existing rules make almost any kind of approach to statutory interpretation possible and capable of ample justification by authority. If Dr. Allen accepted the logic of his own analysis, he would probably arrive at something like the "common sense," or "intuitive," or "hunch" approach to statutory interpretation, at least in the marginal cases. But then, Dr. Allen has previously rejected with some scorn such suggestions made by Frank and other realists. Hence, he concludes the section with the sentence that "What seems to be needed most of all is a more scientific consistency of principle." To one reader at least the previous hundred pages seem to have conclusively shown that such scientific consistency cannot be attained by the use of present rules, and that it has utterly eluded the most brilliant judicial minds. Hence, the present reviewer suggested some years ago that it might help if we did not treat statutes as being all of one kind, but distinguished between constitutional documents, taxation statutes, penal legislation and other types of statutes. This was not meant as an answer to all the problems, but as a guide which would make the problems of statutory interpretation more definite and intelligible. But Dr. Allen specifically rejects this approach. It is, therefore, difficult to see what he can mean by a more scientific consistency of principle. His previous argument has shown that such consistency does not seem to exist, while he refuses to explain how it could be attained.

These criticisms do not detract from the admiration for the brilliance and learning of a work which is now classical. Like every mature jurist, Dr.

[1] For a fuller discussion of this whole problem, see the present reviewer's article on "Judges, Politics and the Law," in the *Canadian Bar Review* for October, 1951.

Allen knows that there is no simple answer to the complex problems of jurisprudence. The chief merit of the book probably lies in this very quality; it does not dogmatise or give superficially certain answers; it compels the reader to doubt and to think. This is one of the privileges as well as one of the burdens of a free society.

W. Friedmann.

The Evolution of Law and Order. By A. S. Diamond, M.A., LL.D., Barrister-at-Law. [London: Watts & Co. 1951. viii and 342 pp. 21s. net.]

Much has been added to our knowledge since the time of Sir Henry Maine. We now know that the connection of law with religion, the priestly-aristocratic monopoly of legal knowledge, the rigidity of legal forms and the importance of procedural rules are characteristic not of the earliest but of a comparatively late stage of social and legal development. Maine began at the beginning of legal history, but behind legal history there lies a long prehistory, the materials for whose investigation were not available to him. Among the investigators and exponents of this prehistory Dr. Diamond is outstanding. His *Primitive Law*, first published in 1935, is already something of a classic. Its theme is expanded in the present work, which is addressed to readers who need have no previous knowledge of law or of anthropology. Dr. Diamond disagrees with those who believe all civilisation to have been diffused from a single centre of origin, preferably Egypt. For him it is the economic level of a people that determines its civilisation, of which its law is "the distilled essence," and legal institutions undergo "a common process of change as civilisation advances." Admittedly many peoples have imported legal institutions from others, but only when they were economically ripe for them, and he finds many instances of legal similarities among peoples of the same economic level between whom borrowing is inconceivable. His work is, therefore, primarily a generalised economic history tracing the progress of man from "savagery" (the stage of food-gathering followed by the beginnings of agriculture) through "barbarism" (the beginning of cattle-keeping; the period of the early codes) and "early civilisation" (when pastoralism and agriculture equally provide the sustenance of the people and when villages and towns and organised markets are to be found; the period of the central and late codes) to "the modern age." His generalisations are sometimes sweeping. The stage of the late codes, for instance, is to be found in England from A.D. 1100 to 1300, in France and Italy from about A.D. 1000 to 1250, in Palestine in the time of the Old Testament, in Rome in the time of the Twelve Tables, in Athens in the eighth and seventh centuries B.C., in Assyria about 1400 B.C., in much of India from the ninth century B.C. to the seventeenth century A.D., and in much of China during at least the last three thousand years, at the beginning of legal history in Sumer and Babylon about the end of the third millennium B.C. and in modern times in the Abyssinia of 1935 and among the great majority of the nations of Nigeria, the Gold Coast and Ashanti. What is there common to all these peoples? Many things, according to Dr. Diamond. "Never again does religion hold such power over the mind of man . . . the jurisdiction of ecclesiastical courts is at its height" (at the end of this period comes the parting of the ways and some peoples advance to a theocratic government in which the ecclesiastical courts oust all others, other peoples to a secular government in which the jurisdiction of the ecclesiastical courts is limited or disappears altogether). . . . "Feudalism is at its height but begins to wane before the end of the period. There is a far-reaching economic advance, and money is now in wide use, and the banking or deposit of money is first seen. Towns show a great spread in number and size, and there is a notable increase in the extent of specialisation in trades

and occupations. The same age gives birth to the world's great legal systems in Babylon and Rome and England. The law of crimes and the law of civil wrongs continue to grow closer together, and now they are at their nearest, but are about to grow apart again. The blood feud is at its height. Intentional homicide is punishable with death, and in regard to serious wounding the doctrine of an eye for an eye and a tooth for a tooth makes its brief appearance."

It is not possible, at least for one unlearned in anthropological studies, to check Dr. Diamond's use of evidence. He tells us that his book is "a collation of the best information available as to several thousand tribes and nations" and that considerations of space have made it impossible for him to do justice to the mass of evidence on which many of his statements are based and have compelled him to content himself with citing only a few instances. Nevertheless, it can be said that he has produced a remarkable amount of detail, even if in summarised form, to support his thesis of concurrent economic and legal development. The legal historian and the sociological jurist should alike profit from his work. The former will find instructive parallels and perhaps a clue to the meaning of some institution inexplicable if studied in isolation; the latter will gain depth for his picture of law as the product of social needs.

A. H. Campbell.

Supra Crepidam. By The Rt. Hon. Lord Cooper. [Edinburgh: Thomas Nelson & Sons, Ltd. 7s. 6d.]

The contribution made by the Parliament House to Scottish scholarship has never been restricted to the law; and there is a robust tradition of refusal to stick entirely to the legal last. Lord Cooper, with men like T. B. Simpson and J. R. Philip, maintains this tradition today. For the Lord Justice-General the more abstruse the problem, the greater the intellectual excitement. His recent small book contains his four presidential addresses to the Scottish History Society, and we may applaud the enterprise of Messrs. Nelson who have made them available to the educated public in general.

Each of the four papers certainly justifies the learned author's contention that it is sometimes useful to apply the technique of one subject to the elucidation of another totally different subject. One may reflect on the debt which Military Intelligence owes to dons and to training in the laws of evidence; or, in another field, on the debt which Western theology owes to the technique and terminology of Roman jurisprudence. Lord Cooper applies in succession the techniques of law, cartography, astronomy and literary criticism to help solve the problems of the historian.

For his first paper the author has chosen his text from Holdsworth's *History of English Law*, "History can humanise law and law can correct history; together they accomplish much that neither can accomplish alone." He illustrates his point by references to pre-Union Scottish statute law. The Scottish lawyer may well ask the historian for an explanation of those periodic outbursts of statutory reform in private law, which were clearly designed to cope with urgent contemporary problems, but which have also had a permanent effect upon the Scottish legal system. Lord Cooper cites as illustrations the fifteenth century legislation aimed to benefit the "puir tennentes" or "the puir people that labouris the grund." These measures do not belong only to the province of the legal historian. Herein is to be found the basis of the Scottish law of leases, the provision of greater security of title for landowners and tenants, and the freeing of land from feudal restrictions upon alienation *inter vivos*. Lord Cooper calls on the historians to explain why this legislation should have been passed when it was, and he points out that the periods marked by these reforms are generally regarded

by historians as rather dull and uneventful. What explanation can be offered for these concessions apparently extorted from the powerful minority in favour of the politically impotent majority? There is no record of a Tiberius Gracchus or Langland in fifteenth century Scotland, nor were the governing classes renowned for their enlightenment. The historians may assess the part played by public opinion, or by fear of peasant revolt.

The Lord Justice-General also discusses that remarkable body of seventeenth century legislation which introduced the positive prescription, public registration of deeds and other enactments to suppress fraudulent dealings in land. About the same time, legislation which is still in force was passed to frustrate fraudulent debtors. Fraud and chicanery seem to have flourished in Scotland during the sixteenth and seventeenth centuries, and Lord Cooper—elder and staunch Presbyterian as he is—has a tilt at the godly when he comments upon the concurrence of wholesale fraud and the victory of John Knox.

Lord Cooper contends that, in contrast with the common law countries, the bulk of pre-Stair Scots law is statute law. Many of these admirably drafted enactments remain in full vigour today. Accordingly, one may deplore the oversight of those responsible for the third edition of *Statutes Revised* who, having dealt carefully with all English statutes from 1235 onwards, entirely overlooked pre-Union Scottish legislation. They may plead that the doctrine of desuetude makes revision of the Scots Acts a somewhat complex undertaking, but to ignore them is scarcely excusable. After a perusal of Lord Cooper's book, one may also question the sweeping judgments of some historians regarding the vision and capacity of the men charged with the ordering of Scottish affairs during those decades which, though rejected by the historians, have provided the cornerstones of the Scottish legal structure.

The fourth paper, dealing with the Declaration of Arbroath—the Scottish barons' declaration to the Pope in 1320 urging His Holiness to restrain the English and to recognise Robert the Bruce as King—does not deal with constitutional implications. Nevertheless, it deserves the attention of legal historians on broader grounds. The sonorous periods of the Declaration, like some clauses of another great constitutional document signed during the previous century at Runnymede, have helped to compel the reverence of posterity for the substance.

Lord Cooper's book may be commended for its brevity, its clarity, its freshness and for the encouragement which it provides for critical thought and for the breaking down of academic frontiers.

T. B. Smith.

A Prospect of Gray's Inn. By Francis Cowper, of Gray's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. 187 pp. 30s.]

The Inns of Court—"unchartered, unprivileged, unendowed, without remembered founders" as Maitland described them—form a fascinating study, both as professional associations and as social and educational institutions. The main sources dealing specifically with the history of Gray's Inn are the Pension Books from 1569 (in MS. from 1800), the Admission Registers from 1521 (in MS. from 1889), Douthwaite's *Gray's Inn: Its History and Associations* (1886), *Gray's Inn Library* (1929), several short histories by Sir Dunbar Plunket Barton and others, and articles in *Graya* from 1927. We cannot trace how the manor of Purpoole with pasture and ploughland and windmill and dovecote became Gray's Inn, but it belonged to the family of de Grey and we know the names of some of the fourteenth-century members of the Inn. Though the extant records begin as late as 1569, not long after that date the Inn could count among its members Lord Burghley, Francis Walsingham, Sir

Nicholas Bacon, Lord Howard of Effingham and Sir Philip Sidney. Its brightest legal luminaries have been Sir Anthony Fitzherbert, Sir Francis Bacon and Sir John Holt. In the twentieth century it has been adorned by Lord Birkenhead and Lord Atkin. The number of its judges is probably less than those of the three other surviving Inns, for it is the smallest; but it has contributed a remarkable number of persons distinguished in Church and State.

Mr. Cowper has most successfully selected and condensed his material, preserving the balance between biography, architecture, and the structure of the legal profession. That he could have written a book of this size from the biographical standpoint alone is evidenced by the sketches he has contributed to recent numbers of *Graya*. We are given a vivid description of the life of the lawyers, the masques and revels, in the time of Elizabeth and James I. There follows a carefully impartial account of the effects of the Reformation and the Civil War. The Civil War and the Commonwealth saw the end of the readings and revels, and the decay of legal education. It is shown how the buildings had become by the end of the eighteenth century more or less as they were in 1940, though it must be difficult for young members to visualise them unless they are fortunate enough to possess copies of *Country Life* for November 6 and 13, 1937. Coming to the nineteenth century we see how the industrial revolution led to a great increase in the number of barristers, and, paradoxical though it seems when we consider the medieval boundaries of London, it was then that Gray's Inn became remote. The author does not gloss over the decline of the Inn in the early 70's, but this adds drama to the story of its revival at the end of the century with Tim Healy, Atkin and F. E. Smith. Our spirits rise with the increased vitality shown in the twentieth century, only to be depressed again by the severe war damage. The story ends on an optimistic note with the resumption of dinners and the plans for reconstruction. Mr. Cowper endorses the decision to give priority to the rebuilding of the Hall, which was opened by Master H.R.H. The Duke of Gloucester on December 5, 1951—for the Hall is, and always has been, "the very heart of the Society's life."

The book is written throughout in a pleasing style. It is a handy size, and will interest a wide range of readers, legal and non-legal. All members of the Inn will want to have a copy. There are seven well-chosen illustrations of the buildings at various periods, and an engraving from Lincoln's Inn on the dust cover. The Treasurer, Sir William McNair, provides a foreword. Lists of Treasurers from 1901, of present Benchers and of members associated with America, a bibliography and an efficient index complete the book. The publishers did well to bring it out in time for the re-opening of the Hall, but surely the price is unreasonably high for a book of this size.

The smooth flow of the narrative is not obstructed by excessive detail, but it does contain a number of facts that will be new to most readers. Two things that we learned were that the Court of Exchequer sat in Gray's Inn Hall during vacation from 1789 to the middle of the nineteenth century, and that the three-sided iron stove in Henekey's wine bar next door to Holborn Gate is the one that used to stand in the middle of the Hall. Some will be specially interested in the literary associations, which include (besides Philip Sidney and Francis Bacon) William Shakespeare, John Evelyn, Samuel Pepys, Dr. Johnson, Charles Lamb, Charles Dickens, W. M. Thackeray and Hilaire Belloc—not all members, of course. Others may be more moved by the thought of the thousands of obscure lawyers over the centuries who have lived and dined in the Inn, and who have left not even a memorial such as Sam Denton pasted in his satinwood tea caddy: "My mother gave this tea caddy in the year 1790 or 1791 when I went to reside in my chambers. . . . I never will part with it. Oh, how I admire my tea caddy and my silver cream jug. I am 76 next birthday, Sam Denton."

O. HOOD PHILLIPS.

THE SALE OF GOODS. By CLIVE M. SCHMITTHOFF. [London: Stevens & Sons, Ltd. 1951. xxviii and 272 pp. (with index). 25s. net.]

THIS is the first volume in a new series on Business Law and Administration, of which Messrs. Stevens have undertaken the publication under the general editorship of Dr. Schmitthoff. In his preface to the present volume the editor explains his general aims as being to link the exposition of the legal principles and rules relating to particular branches of business with the practical needs and requirements of those engaged in their pursuit, and he quotes wise sayings from Charles Molloy and Lord Mansfield, each of whom in his own way did so much to establish our commercial law as a sound and useful branch of our jurisprudence.

In selecting *Sale of Goods* for the initial essay Dr. Schmitthoff has certainly chosen the branch of commercial law which affects much the largest number of business men, and he has undoubtedly added an excellent and up-to-date textbook on the subject to the substantial number which already exist. At the same time, it can hardly be said that the present volume has such distinctively practical characteristics as to differentiate it from all its predecessors. For the business man its value will presumably be in its much fuller treatment of the subject than was possible in the smaller volumes contributed by such writers on the subject as Professor Eastwood and Mr. Austin. I am myself, however, very doubtful whether it is wise for the average business man to attempt anything more than a grasp of the broad general conception of the subject which the authors of the smaller textbooks put before him.

For practitioners, on the other hand, Dr. Schmitthoff's book is unlikely to supersede *Chalmers* as a *vade mecum,* since it contains only a selection of the case material, though that selection is excellently made. In the absence of a really satisfactory students' textbook on this subject the present volume may well prove most useful in that quarter, at any rate for the time being; though, as Dr. Schmitthoff recognises, the form which he adopts, which is that of a commentary on the individual sections of the Sale of Goods Act, 1893, is not at all satisfactory for such a textbook. Indeed, his treatment of a number of important topics is quite inadequate from the point of view of the student, who in order to grasp the essentials of the rules set out in the text must be given an explanation of their origin and purport. A good example of this is the rule on market overt, which is accurately enough set out but which makes no sense whatever to a student unless he is made acquainted with its history. And why should there be an exception in cases where the thief is prosecuted to conviction? Here again a couple of sentences of history would show that once upon a time at any rate the exception had some sense in it. These lapses are the more difficult to understand because Dr. Schmitthoff provides an admirable short historical introduction to the whole subject which is a model of its kind.

To the reviewer the great virtues of the present work are the lucidity and accuracy of its exposition, and the excellent choice of illustrative case material. Dr. Schmitthoff has taken most of his case material from decisions given over the last twenty years and seldom goes back to the period before the passing of the Sale of Goods Act. This not only gives an impression of realism to his exposition, but makes evident the wealth of judicial reasoning which exists in the modern reports.

One of the most difficult of all the problems which has confronted the courts in connection with sale of goods cases has been the measurement of damage. Sir Mackenzie Chalmers' attempt to set out the rules shortly in some four sections of the Sale of Goods Act, 1893, was by no means successful, and judges have been at work ever since trying to elaborate a series of rules which will effectively order the matter. The result is a mass of difficult case law, the substance of which Dr. Schmitthoff sets out with admirable lucidity, and

if there is any part of his book to which lawyers may be advised to turn for help it is this. Except for a somewhat cursory treatment of the leading case of *Williams* v. *Agius* [1914] A.C. 510, his treatment of the subject could hardly be bettered.

As is natural in a first edition there are a substantial number of passages which need attention, and of printer's errors which need rectification when a second edition is called for, as doubtlessly it will in due course. At p. 53 it is stated that "the condition (which is of higher legal order than the warranty) includes a warranty, but not vice versa." A lawyer might perhaps cavil at this statement, but what is more important is that without much fuller explanation it is likely to be meaningless to a business man. At p. 59 it is stated that "implied conditions relating to quality and fitness are treated in ss. 13–15." Actually section 13 is concerned with the wider category of description, and not in any way restricted to quality or fitness. The discussion of "particular purpose" here does not allude to the difficulty of distinguishing "particular" from "general" purpose which has been discussed in some of the cases. Also, I think that the rather complicated problem of sample sales by description is best understood in the light of *Drummond* v. *Van Ingen* (1887) 12 App.Cas. 284; it is, of course, true that this case was decided before 1893, but Dr. Schmitthoff has not completely eschewed the use of the older cases, and occasionally there is no modern case which fits half so well as does one of the classics. At p. 96 it is stated that "in the nineteenth century it was thought that some dock warrants, warehousekeepers' certificates and delivery warrants or orders might be documents of title . . . but in modern mercantile practice the tendency is to deny this quality to them." The first part of this statement is not accurate as these documents were in fact held to be documents of title in the cases or by statutory definition, and the most that can be said about modern mercantile practice is that it tends to place less emphasis than formerly on this aspect of them.

Among the printer's errors which I have noticed are: p. 64, Aston J. (Acton); p. 67, *Re Wait* appears in the index as *ex parte Wait* (incidentally, this important case is worth much fuller treatment); p. 104, *Anderson Ry.* v. *Well Brothers* (should be Weil). Incidentally, I find the unusual use of the words "buyer" and "seller" without the "the" rather irritating, though this is purely a matter of taste.

C.

Benjamin on Sale. Eighth Edition. By The Hon. Sir Donald Leslie Finnemore, one of Her Majesty's Judges of the Queen's Bench Division, Honorary Fellow of Pembroke College, Oxford, and Arthur E. James, of the Middle Temple, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1950. l and 1040 and (index) 51 pp. £5 10s. net.]

A new edition of *Benjamin on Sale* after an interval of nearly 20 years is indeed an occasion, and the task of reviewing such an honoured "classic" must be approached with all due respect and humility. The task is, however, made easier by the pleasing appearance of the volume, with its well-spaced paragraphs, the frequent subdivisions, and the attractive print and binding It can be said, too, at the outset that the present learned editors have fulfilled their exacting undertaking with a degree of success which merits our gratitude and admiration.

Yet it may perhaps be permitted to query the correctness of the general policy indicated by the first sentence in the preface to this new edition, where the learned editor-in-chief writes: "When I was invited in 1944 to prepare a new edition of *Benjamin* it was decided that no more changes than

necessary should be made, so as to retain as much as possible of the original book."

It must be remembered that it is now some 80 years since the second edition of this work, which was the last edition to be undertaken by the author himself; and that this second edition appeared in 1873, just 20 years before the Sale of Goods Act, 1893, which had for its aim the codification of this branch of the law—a codification which, it is generally agreed, has been very successfully achieved. The major difficulty which subsequent editors must have experienced is the incorporation of the Act into the original text, and it must be remarked that this task has still not been too happily accomplished in several chapters.

The main criticism must be that too much pre-1894 authority is being retained for its own sake, and not for one of the three legitimate functions of case-law in a subject which has been codified, namely, to illustrate the application of the codifying enactment, to fill the inevitable lacunæ—whether they arise, as it were, accidentally or under an express clause saving the operation of the common law, such as section 61 (2) of the Sale of Goods Act—and, lastly, in those instances where the statute has in fact modified the common law, to provide examples of that earlier law so as to enable the modifications more fully and more readily to be appreciated.

Reference in this connection might be made to the remarks of Sir H. H. Cozens-Hardy, as he then was, the Master of the Rolls, in the case of *Bristol Tramways* v. *Fiat* [1910] 2 K.B. 831, at p. 836: "The case really turns upon section 14 of the Sale of Goods Act, 1893. I rather deprecate the citation of earlier decisions such as *Chanter* v. *Hopkins* or *Shepherd* v. *Pybus*. The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at. . . ."

Or, as Sir Mackenzie Chalmers—the draftsman both of the Bills of Exchange Act, 1882, and of the Sale of Goods Act, 1893—states in his preface to the third edition of his *Digest of the Law of Bills of Exchange*: "The cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act."

This dictum of the learned Master of the Rolls is not to be found in *Benjamin*, nor is any discussion as to the general relationship of the common law and the statute; and so we find the common law preserved as being equally important as an express statutory provision, as can be seen in the chapter on Remedies against the Goods—Resale, p. 935. After two pages of introduction, consisting almost entirely of pre-1894 decisions, with no indication of the effect of the Act on these decisions, we find this simple, yet significant, sentence: "It will be convenient to consider the seller's right of resale, first at common law, and then as enacted in the Sale of Goods Act." Seven pages are then devoted to the common law before 1894—still with no indication of whether any of this is still valid—and finally four pages discuss section 48 of the Act, which lays down the present law on this topic. It is submitted that the whole emphasis is misplaced, with a consequent loss of unity and clarity.

With a suitable selection from the same material, a much more logical and satisfying treatment could be achieved, by considering first and foremost section 48, and discussing whether or not it has modified the common law in any respect. If it has not, then examples of its operation could be given from both pre-1894 and post-1893 cases; if it has modified it, then pre-1894 cases could be called in aid to throw those modifications into relief; and then doubtful questions arising on the statute, or out of omissions from the statute, could be considered, again with the help, if necessary, of pre-1894 decisions.

Some space has been devoted to this matter, as it is felt that therein is to be found the reason for the criticism which is often levelled against *Benjamin*, namely, that the text is disjointed. It is appreciated that this course might

well involve the omission of more of the original work, but, after all, the words of the Master himself can always be found in the second edition—indeed, even now for some of our learned colleagues, *Benjamin* means the second edition.

To turn briefly to matters of more detail, the actual text in the chapter on Resale requires amendment in several places in view of *Gallagher* v. *Shilcock*, which is discussed at p. 945. Thus, the submission in Conclusion 3 on p. 951 that the contract is rescinded on a resale without any express power being reserved, can no longer stand, while the last paragraph on p. 947 similarly needs correction. The remark on p. 951 (footnote (*n*)), that no mention is made of notice in *Maclean* v. *Dunn*, is incorrect, as indeed is pointed out in the text at p. 937.

The discussion of the consequences of frustration, too, is unsatisfactory for a work of this magnitude. Thus, we are given, at p. 577, the facts of *Chandler* v. *Webster* (where the contract is not one for the sale of goods), and of the *Fibrosa Case*, and, on p. 578, an outline of the Law Reform (Frustrated Contracts) Act, 1943, in its application to contracts for the sale of goods, but it is only as a sidewind that we learn on p. 579 that the rule in *Chandler* v. *Webster* has never applied to sales of specific goods where the goods have perished before the risk has passed to the buyer, and that it has long been established that in such cases the buyer can recover any advance payment he may have made. In this respect, the main paragraph on p. 147 is most misleading.

In a different direction, it might be suggested that a Table of Statutes might be included, at any rate, of statutes other than the Sale of Goods Act itself, which appears in Appendix I with marginal notes indicating the pages at which the various sections are principally discussed. And, no doubt, consideration has been given to the desirability of giving all the references to a case in the Table of Cases, rather than in the footnotes every time the name of the case appears; perhaps the first main reference might be left in the footnotes, together with, of course, the date of the case. This would have the additional advantage of reducing the space occupied by the footnotes.

As for omissions of recent cases, the most striking would appear to be—apart from those already noted elsewhere—*Ecay* v. *Godfrey* (1947) 80 Ll.L.R. 286 (on representations and warranties); *Mason* v. *Burningham* [1949] 2 K.B. 545 (on section 12 (2)) (this case is discussed on another point, and is wrongly given in the Table of Cases as *Mason* v. *Birmingham*); *Warman* v. *Southern Counties Finance Corporation* [1949] 2 K.B. 576 (on hire-purchase); *Mercantile Union* v. *Ball* [1937] 2 K.B. 498 (hire-purchase by infant); *Denny, Mott and Dickson* v. *Fraser* [1944] A.C. 265 (on frustration); *Mona Oil Co.* v. *Rhodesia Rys.* [1949] 2 All E.R. 1014 (prevention of performance).

The only reference to *Leafe* v. *International Galleries* is a footnote on p. 428, while the omission of any reference to such cases as *The Glenroy* [1945] A.C. 124 and *Comptoir d'Achat* v. *Luis de Ridder* [1949] A.C. 293 leads to the observation that the C.I.F. and F.O.B. forms of commercial contract are very inadequately examined in a work of this nature.

Of ordinary printers' errors there seem very few, but there are numerous trivial and unnecessary discrepancies between the names of cases as given in the text and footnotes and as given in the Table of Cases. If we are to be given the facts of *Aldridge* v. *Johnson* on p. 3, they might as well be the true facts as stated later on p. 333.

Such detailed criticism in individual topics must not, however, be allowed to detract from the soundness and value of the text as a whole. The edition can well take its place beside the earlier ones, countless practitioners will be happier now that they can once again refer to a recent *Benjamin*, and it is to be hoped that another 20 years will not be allowed to elapse before we are favoured with the next.

C. F. PARKER.

NATHAN'S EQUITY THROUGH THE CASES. Second Edition. By O. R. MARSHALL, M.A., PH.D., of the Inner Temple, Barrister-at-Law, Sub-Dean of the Faculty of Laws and Lecturer in Law at University College, London. [London: Stevens & Sons, Ltd. 1951. lx and 552 and (index) 6 pp. 35s. net.]

THE large volumes of J. W. Smith on Common Law, F. T. White and O. D. Tudor on Equity, and of the latter text writer on Real Property and Conveyancing may be regarded as the ancestors of the family of books of Leading Cases in English Law, and they were succeeded by a progeny of volumes on a slighter scale, such as Shirley on Common Law and Brett on Equity, all based on the leading case system, but whereas the major volumes set out the text of the judicial decisions, virtually *in extenso*, and appended thereto a copious commentary with a repertory of allied cases cited referentially, the minor volumes more or less summarised the judgments and annotated them in epitome. *Nathan's Equity Through the Cases* on its first appearance in 1939 broke new ground, setting out the judicial decisions on an ampler scale than the minor volumes envisaged, providing a pithy headnote afresh, together with a running commentary, less in the nature of an Index of similar cases than that of the major volumes, while sufficiently referential yet forming a compact presentation of the whole relevant law in relation to the subject of the case submitted as a leading judicial authority. The dust cover adds to the title "Equity Through the Cases" the apt phrase "and Judicial Exposition." The book differs from the usual type of "case book" in that each section is given a subject title to head the illustrative leading case and, as the Editor observes, in many places he has "been content to let the cases speak for themselves" without having "added some explanation," in other words the maxim *res ipsa loquitur* has been applied to the presentation of legal literature at the appropriate point. A typical instance of the method adopted is to be found by referring to the section on "Charitable Trusts," rearranged and expanded to include the most recent decisions to the date of completion of the work. It is, of course, an inherent difficulty in works of this kind that the law moves more rapidly than it can be easily overtaken, and the law relating to Charities has taken unto itself an appreciable set of additional cases since the material date. The Editor anticipated this in his Preface, where he refers to the possibility of amendment of the text consequential on the "Diplock" litigation reaching the Lords at the stage of publication, the case having only got as far as the Court of Appeal. Among the most valuable features of the work are the references to current text writers, both in the realm of books and of periodical literature. The expositions are not only readable but widely comprehensive, and have proved of valuable utility not only in the academic sphere but also in that of professional practice, the portability of the volume and the convenient format and presentation of the text all helping in that behalf. The term "Equity" is used mainly in relation to trusts, but cases include leading authorities such as *Reid* v. *Bickerstaff* [1907] 2 Ch. 305, and *Elliston* v. *Reacher* [1905] 2 Ch. 374, 665, in respect of restrictive covenants, usually considered in relation to Real Property Law and Conveyancing practice. No two persons are inclined to make the same selection of leading cases, and some of us may miss, here and there, a favourite "war horse" and be surprised to find another raised to the higher status. One misses, for instance, that old friend *Re Adams and the Kensington Vestry*, 27 Ch.D. 394, in respect of "Precatory Trusts", and, indeed, in this behalf *Re Atkinson*, 80 L.J.Ch. 370, merited citation where the earlier cases are reviewed. On the other hand the referential annotation is so widely extended that *Re Howard*, reported alone in *The Times* newspaper, October 30, 1908, finds place. One suggestion is offered for a future edition and that is the addition of a Table of Leading Cases to that of the General Table of Cases cited in the work

as a whole, or else the printing in larger type of the names of the former than that of the latter, making reference easier. *Nathan* is a book not only for the student's locker but also for the practitioner's handbag, for equipped with this *vade mecum* when away from an easily accessible library one has a *multum in parvo*, within its limits, which consultation at many points in practice has proved to be both reliable, making allowances for subsequent development, and remarkably elucidating. Dr. Marshall is to be congratulated on a fine piece of work, well worthy of the outstanding contribution which the original compiler added to the contemporary Law Library.

Bertram B. Benas.

The British Penal System 1773–1950. By R. S. E. Hinde, Chaplain and Senior Tutor, Hertford College, Oxford. [London: Duckworth & Co., Ltd. 1951. 255 pp. 10s. 6d.]

In the course of the past 12 months there have been a number of books on penal administration in this country designed to gain, for the new methods in the combat against crime now coming to the fore, that support among the public at large without which they cannot fully develop or hope to bear fruit. Lord Templewood, Miss Margery Fry and the late Sir Alexander Paterson have already had the word, but Mr. Hinde's unpretentious volume, which appears in a series of "Social Science Studies," makes a further important contribution to the debate. It helps to get the present position into proper focus by approaching it from the purely historical angle and describes how it has come to be what it is.

It is perhaps the most striking fact which emerges from this scholarly survey of the painful and halting way in which our penal system has moved forward during the past two centuries that the reformative approach to criminal offenders is by no means as recent and "modern" as some might be inclined to suppose. Mr. Hinde, who has drawn extensively upon contemporary documents and has throughout left them to speak almost for themselves, shows that ever since the beginning of central government supervision of prisons in 1835 considerable emphasis has been laid on the need "to train the prisoner so as to fit him for successfully encountering the hardships and temptations to which he will be exposed on his return to society, thus reducing to its lowest point his danger of relapse into evil courses. Now the cardinal feature of this treatment is to place the fate of the prisoner in his own hands. . . ." The quotation dates from the year 1857.

It is on the means to achieve this end that opinions have differed so profoundly and it is this difference of opinion, not fully resolved yet, which is responsible for the lack, even today, of consistent enforcement of our criminal laws.

Solitary confinement has disappeared and so have purely repressive and punitive measures, but the stage has yet to be reached where courts, prison authorities and prison staffs, in deciding (after conviction) on the treatment of an offender and in its execution, are guided, within the limits prescribed by the law, by the prisoner's capacity and need for readjustment through training rather than by the gravity of the specific offence with which he was charged. Treadwheels, cranks and oakum picking have gone, and it is today almost universally recognised that reformation and readjustment is impossible without settled habits of sensible work; yet satisfactory employment and training in a useful trade or craft is exactly what many prisons, for reasons largely outside their control, cannot yet provide. As a result, not a few prisoners find themselves upon release little better prepared for a useful life in society than they were at the start.

Seen in long-term perspective, one of the most noteworthy achievements of the penal system in this country is the gradual removal of children and juveniles from the prisons and the setting up of other institutions better fitted to deal with them. The "drag of public opinion" has hampered progress in this field far less than in dealing with adult delinquents, and above all recidivists, but even Borstal comes in periodically for some of the criticism so freely levelled by poorly informed public opinion against all forms of open prisons. Mr. Hinde aptly quotes a statement made by Mr. Winston Churchill, as Home Secretary in 1910: "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country." This account, concise, objective and fully documented, shows that this country need not be ashamed of its record and that the spirit of John Howard and Elizabeth Fry is still alive today. To know this can be no ground for complacency, for much remains still to be done and the active support of public opinion is essential to the success of the present policy of training and rehabilitation.

H. A. Hammelmann.

The Justices' Handbook. By J. P. Eddy, K.C. Second Edition by the Author. [London: Stevens & Sons, Ltd. 1951. xiv and 224 pp. (with index). 12s. 6d. net.]

We reviewed the first edition of this book in 11 M.L.R. at p. 367, when we expressed the opinion that its chief virtue was the success with which Mr. Eddy had picked out the topics most likely to be useful to the average magistrate, and the practical way with which he dealt with them. We also made a few criticisms on matters of detail which we notice have not been attended to.

In this edition Mr. Eddy was faced with incorporating the major provisions of recent important statutes, particularly the Criminal Justice Act, 1948, and the Justices of the Peace Act, 1949. This was bound to test severely his policy of keeping his book short and succinct, and although he has struggled manfully, he has not altogether succeeded for the book has grown by nearly a third in length which is a disproportionate amount; and the price has increased by nearly 50 per cent. The work of incorporation has been well done, and the volume is still within a very reasonable compass, but if it grows at this rate in future editions its purpose will be largely defeated. Incidentally it should be noted that the work of Quarter Sessions is not dealt with.

C.

Security, Loyalty, and Science. By Walter Gellhorn. [Cornell University Press; London: Geoffrey Cumberlege. 1950. viii and 300 pp. (with index). English price, 24s. net.]

When I received this book for review I had a feeling that so substantial a work on what seemed so limited a subject must contain a great deal of padding. I should have realised that a book by so eminent a lawyer as Professor Gellhorn would be a solid production, as indeed it has proved. For although there is some over-emphasis and repetition of the argument, the volume is a closely documented account of the provisions of the American law and procedure relating to the "securing" of atomic and other weapons, and the effect of these upon the life and liberties of American scientists. It is therefore concerned with aspects of civil liberty quite different from, though just as important as, those described in the textbooks on constitutional law.

The result is to intensify and concretise one's vague fears that all is not well on this front in the U.S.A. A great deal is, indeed, obviously very ill,

and no one reading these pages can escape the conclusion that the American people are in grave danger of losing the cold war. It is obviously impossible for fundamental scientific research to go on in such an atmosphere, and subject to the control of bureaucrats terrorised by politicians many of whom are stupid and dishonest, and others of whom are demoralised and panic stricken, and all of whom are subject to the blind hysteria of a lumpen proletariat which they themselves have worked up into such a state of fear and bewilderment that it has become incapable of either judgment or decency of conduct. We, in this country, have had some experience of loyalty tests, and of offences against the Official Secrets Act, but our situation compared with that existing in the U.S.A. gives no cause for real worry, unless, of course, the Americans infect us with their own virus.

Fortunately the battle is not lost. There are still many men in the U.S.A. of eminence, judgment and courage who have kept their heads. It is gratifying to find that so many of these are leading lawyers, judges in the superior federal courts, teachers in the great American law schools. Indeed, the fact that the close investigation of the whole problem which this book describes should have been made possible by a grant from the Rockefeller Foundation, and that the volume itself should have been published by a great American university are themselves sources of encouragement.

C.

La Crise de l'État aux États-Unis. By Roger Pinto. [Paris: Librairie Générale de Droit et de Jurisprudence. 1951. 248 pp.]

This is an acute and penetrating study of recent constitutional and political developments in the U.S.A. by one of the professors in the law faculty at Lille. His thesis is that without the American people knowing it the executive has acquired the dominant power in the State, has in large measure established a collective or at any rate a controlled economy, has turned the State administrations into something little more than federal agencies, and has tamed the Supreme Court so that it has ceased to be a political arbiter, and has become a mere protector of the liberties of the individual. This thesis is worked out in some detail and with considerable ingenuity.

C.

Cases on Private International Law. By J. H. C. Morris, D.C.L. Second Edition. [Oxford: University Press. 1951. xxvii and 417 pp. 30s. net.]

This book is of such outstanding quality that even those teachers of law who dislike case-books will wish to encourage students to use it as on many occasions it will make recourse to the last edition of *Dicey* unnecessary and on others will help students to appreciate the gist of the more lengthy treatment in the textbooks. In this edition the number of cases reported has been considerably increased, they have been arranged so as to cover the subject more fully and in a more logical order. But the attraction of the book derives not so much from the cases, however carefully selected and edited, as from the explanatory Notes. They present a concise, yet comprehensive and balanced survey of the topics under which the cases have been grouped. However brief, they are not written on an elementary level. They do not conceal or suppress the difficulties and uncertainties which indeed attract and stimulate interest in the Conflict of Laws. On the contrary, the Notes are particularly concerned with those matters which are the subject of

controversy. The account given of even the most intricate problems is always lucid, even if not invariably convincing or quite fair to those with whom Dr. Morris does not agree.

The spirit of controversy is shown in the selection of the unorthodox judgment of Denning L.J. in *Boissevain* v. *Weil* as one of those to be included in the cases on Contracts. As the House of Lords did not adopt the view that English law was the proper law of the contract in this case, the decision illustrates no more than that it is impossible to contract out of the stringent rules of public policy (*ordre public international*) of the *lex fori*. It seems, therefore, rather overconfident to say that the reaction against the subjective theory has been judicially inaugurated by Denning L.J.

Again, the case of the advocates of double classification is not stated very fairly. That one of them has abandoned this theory and that the others cannot always agree where to draw the line between primary and secondary classification is hardly an argument. This theory might seem less unattractive if it were pointed that it is concerned to show that, *e.g.*, the question whether a polygamous union is a marriage (in the sense of the English Conflict of Laws) is essentially different from the question whether art. 148 c.c. is part of the French law of capacity to marry.

The arguments raised against *Re Bischoffsheim* do not seem very convincing. The first criticism (on p. 172) only tends to show that the court was misinformed when told that under the law of New York R. W. was considered legitimate at birth, it does not affect the reasoning of Romer J. which proceeded on the factual assumption that this evidence was correct.

When discussing immovables (on p. 266), Dr. Morris explains the concession there made to *renvoi* in terms of the principle of effectiveness which is, to say the least, a weak foundation for any choice of law rule since, if carried to its logical conclusion, it undermines the whole system of Private International Law. Why should it be assumed that Spanish officials will refuse to aid those whose title to Spanish land has been established in an English court in accordance with the English rules of Conflict of Laws? Once the *renvoi* is rejected, in connection with the *lex situs* as on other occasions, it is no longer necessary to feel apologetic about the application of English domestic law to English land. This could easily be reconciled with Cook's contention that only that part of the *lex situs* should be applied which forms part of its land law (a question of secondary classification) and that, as Dr. Morris suggests, the *lex domicilii* should be applied in relation to capacity.

This review is perhaps not the place to discuss these controversies which Dr. Morris is here concerned to report rather than to initiate. A few minor points might, however, be raised. On p. 93, *Risk* v. *Risk* should be cited as it lends support to the view that the validity of a polygamous marriage can be tested as a matter of matrimonial capacity, although the solution suggested by Denning L.J. in *Kenward* v. *Kenward* seems more reasonable. On p. 105, *Wall* v. *Wall* is discussed without any indication that this decision has now been replaced by section 18 (2) of the Matrimonial Causes Act, 1950, with some not unimportant changes, such as requiring residence *for three years*. On p. 175, *Re Askew* is cited as supporting the view that section 1 (2) of the Legitimacy Act, 1926, is only a rule of English domestic law. But this case seems merely to establish that section 1 (2) will not apply to legitimations which do not take effect under the Act. It remains open to argue that the subsection will apply to legitimations under the statutory choice of law rules. On p. 209, Dr. Morris suggests that the case of *P. & O. S.S. Co.* v. *Shand* supports the presumption in favour of the *lex loci solutionis* rather than the *lex loci contractus*, and, to prove this, he assumes two alternative changes in the facts of the case. It is interesting that a similar situation is considered by Dr. Wolff, on p. 438 of his *Private International Law* (2nd ed.). (In Dr. Wolff's example the ship is owned by a *French* company.) Dr. Wolff shows that in the case of standard contracts there is much to be said in favour of the law of the place

where the company carries on its business and this seems preferable to Dr. Morris' choice of the *lex loci solutionis*. On p. 329, Dr. Morris asserts rather too dogmatically that there is no reason for having different choice of law rules for capacity to enter into mercantile or marriage settlement contracts. Yet the two types of transaction have very little in common. The case for the same choice of law rule on capacity to make a marriage settlement contract and on capacity to marry is at least as strong as that for uniform choice of law rules on capacity to enter into mercantile and marriage settlement contracts. When dealing with the authorities on this subject, Dr. Morris repeats in even more emphatic terms his criticism of *Re Cooke's Trusts* and exclaims (on p. 331) that "by no stretch of the imagination could such a (marriage settlement) contract have restricted . . . testamentary capacity." But is it inconceivable that restrictions on testamentary capacity should attach only to those who by contracting out of a régime of community of goods have acquired the ability to dispose of their property away from the family? If that should have been the position under French law it becomes clear that the children's claim to compulsory portions depended upon the validity of the marriage settlement contract.

The author of any case-book as fully annotated as the present would inevitably be asked to enlarge his work into a textbook. But it would be unreasonable to address this request to the General Editor of *Dicey*. One may, however, hope that, in the next edition, he will provide notes on those few subjects which are left without them even if this should finally establish that this book is more than a companion volume to other textbooks.

J. UNGER.

BEITRAEGE ZUM HAAGER INTERNATIONALPRIVATRECHT 1951. By MAX GUTZWILLER and WERNER NIEDERER. [Fribourg, Switzerland: Universitätsbuchhandlung. 1951. ix and 190 pp. No price stated.]

IN the course of last year the movement for the unification of private international law was carried a step forward by a seventh Hague Conference. Its programme was discussed in September, 1950, by the meeting of the Swiss Association for international law. There were submitted to it reports by Professor Gutzwiller of the University of Fribourg on Sales and Goods and by Professor Niederer of the University of Zürich on Corporations. These reports have now been published in a volume which will be found extraordinarily valuable.

It opens with Professor Gutzwiller's report mainly devoted to the three fundamental problems which the Convention will have to solve: which is the law prima facie applicable to *a vente internationale*? should the parties be at liberty to determine the proper law? to what extent are matters relating to the mode of performance subject to a separate legal system? The second and third of these questions are further developed by an excursus; another excursus deals with the delimitation of the proposed Convention's applicability. In a supplemental part the *travaux préparatoires* are printed. The author gives an illuminating survey of the present position of the movement and makes many helpful suggestions for leading it to a point where it may result in a generally acceptable Convention. His remarks on the proper law of the contract are of particular interest. He rightly concludes (pp. 42, 43) that the problem of the autonomy of the parties "must today be deemed to be clarified in all its essential aspects."

The structure of Professor Niederer's report is similar. The main report, amplified by an excursus and the reproduction of antecedent material, discusses the question whether a corporation is subject to the law of the place of incorporation or to the law of the country where it has its seat.

This is a problem which continues to occupy lawyers on the Continent, although English lawyers cannot help asking themselves how the control of the law of the place of incorporation can possibly be open to doubt. It is satisfactory to note that this is the legal system which Professor Niederer decidedly favours and which, according to him, represents the prevailing view in Switzerland. It will not be easy to eliminate the fascination which the seat-theory exercises over Continental lawyers' minds, but Professor Niederer's convincing analysis will, it is hoped, bring the day of its burial much nearer.

The care with which Switzerland has prepared the seventh Hague Conference deserves praise and admiration. If such difficulties as stand in the way of a Convention prove to be surmountable, a major share in the success will have to be attributed to the work done by two of the leading lawyers of Switzerland.

F. A. Mann.

Administrative Agencies and the Courts. By Frank E. Cooper, of the Detroit Bar, Visiting Professor of Law, University of Michigan Law School. [Ann Arbor: Michigan University Press; London: Geoffrey Cumberlege. 1951. xxv and 470 pp. 40s. net.]

The books on American administrative law that are available in this country fall into three main groups. There are the valuable general surveys made by Pound, Landis, Schwartz and others. There are the specialised works on individual administrative agencies; these attract the attention of the student of public administration rather than the lawyer. Finally, there are the case-books. At least six of these massive works have been published in recent years. To read through any of them is a salutary experience for any English public lawyer who tends to feel complacent about his own work. But he puts them down with a sense of bewilderment as well as of humility; they are comprehensive but not always fully comprehensible source-books, interspersed with brilliant editorial heckling which presupposes more background knowledge than the reader overseas is likely to have at his command. What he really wants is a book that gives a detailed and consecutive exposition of the main principles that govern the relationship between the courts and the administration. Professor Cooper has written such a book, and it deserves to be read by all who are interested in this subject. It is of a manageable size; it is admirably arranged; it is written in a lucid and lively style. If the author says little that has not been said elsewhere by others, he has at least succeeded in distilling the essence of a vast number of leading cases and law review articles without overloading the text with citations. That the courts are often motivated by considerations of public policy in determining the standards to which administrative action must conform is freely admitted, and the relevant factors are carefully analysed. This is a most illuminating and readable book, and the author is to be congratulated on his achievement.

S. A. de Smith.

Abstract of Legal Preliminaries to Marriage in the United Kingdom and the other Countries of the British Commonwealth of Nations, and in the Irish Republic. By the General Register Office. [London: H.M.S.O. 1951. v and 189 pp. 6s.]

The officials of the General Register Office, of the Commonwealth Relations Office and of the Colonial Office who with the help of the Dominion and

Colonial Governments and of the Irish Government, collected the vast volume of information summarised in these pages were no doubt pursuing a practical objective: they were catering for the needs of their own officers who must be continuously confronted with problems arising from the diversity of the hundreds of marriage laws existing in the British Commonwealth. This compilation will greatly assist them in solving their problems, but at the same time it is a godsend for the student of comparative law. In it he will find references to the statutes and ordinances governing the law of marriage in each territory, and a summary of the legal rules themselves in so far as they regulate preliminaries (banns, licences, etc.), age of marriage, prohibited degrees, consent to the marriage of a minor, residential qualifications, the persons by whom and the times and places at which marriages may be solemnised, and of the fees payable by the parties. Broadly speaking, the Abstract covers the same ground as the Marriage Act, 1949. It does not give a full conspectus of the laws governing the formal or essential validity of marriage. Thus, while it deals with the publication of banns, it gives no information as regards the ceremony itself, or matters such as the absence of a previous marriage, mental or physical health, mistake or duress. Nor does it set out the legal consequences of non-compliance with those requirements it summarises, so that, *e.g.*, it does not appear from the survey that the marriage of a person under 16 is void under English law, while the lack of parental consent to the marriage of a person between 16 and 21 does not affect the validity of the marriage. From the point of view of those for whose benefit this Abstract was primarily written, all requirements are equal in value, they must all be observed, irrespective of the consequences of non-observance. For the lawyer, however, the distinction between *impedimenta dirimentia* and *impedimenta impedientia* is vital. Yet, in guiding him to the legislative material, the Abstract will enable him to collect even such information as it does not itself supply. What emerges from this Abstract is an appalling lack of uniformity in approach towards fundamental problems of marriage law even as between the common law jurisdictions of the British Empire. There are vast differences in a comparatively simple matter such as the requisite minimum age between the various States of Australia and the common law Provinces of Canada. If any attempt at unification should ever be made, this book will be useful in undertaking it. It will also stimulate thought on law reform in this country. Thus it is submitted that the Province of Manitoba which prohibits marriage by persons under 16 but permits them where "necessary to prevent illegitimacy of offspring" is more humane and more realistic than those countries (like England and Scotland) which do not provide for such an exception. Points of this kind constantly occur to the reader of this work. All those who co-operated in its preparation, and especially the editor, Mr. E. C. Davies of the Registrar General's office, deserve the gratitude of the legal profession.

O. KAHN-FREUND.

ISRAEL'S ARMISTICE AGREEMENTS WITH THE ARAB STATES. A Juridical Interpretation. By SHABTAI ROSENNE. [Tel-Aviv: Blumstein's Bookstalls. 93 pp.]

MR. Shabtai Rosenne is the legal adviser to the Israel Ministry of Foreign Affairs: and he had a leading part in the negotiations and the drafting of the Armistice Agreements, made in 1949 between Israel and four Arab States: Egypt, Lebanon, Hashemite Kingdom of Jordan and Syria. The States are placed in the chronological order in which the agreements were made. This pamphlet is an amplification of a lecture which he gave to the Israel Branch of the International Law Association; and he shows convincingly that the Armistice Agreements are international documents which

are interesting not only from the historical but from the International Law point of view. As one would expect, his study is fully documented, and the author has prefaced the legal analysis of the Agreements by a chapter which gives clearly and concisely the historical background.

In the first place he distinguishes between the terms Truce and Armistice. "The truce is essentially cast in the form of a negative commandment. Thou shalt not." The Armistice may contain positive injunctions duly undertaken. It is an essential character of the four Armistice Agreements that they contain far-reaching transitional provisions to cover the period between the actual ending of hostilities and the formal restoration of peace. So they were intended at the time when they were negotiated to be "preliminaries of peace." Unhappily, in the three years that have passed, the project has not been implemented. The second difference between truce and armistice is that, while the former is a matter for the belligerents alone, the outside world, in this case represented by the United Nations, is deeply concerned with the armistices. The agreements are subordinate to the obligations, contained in the Charter of the United Nations, to refrain from the threat of use of force, and to settle international disputes by peaceful means.

Mr. Rosenne analyses closely the relation of the agreements to Article 40 of the Charter which prescribes provisional measures that may be imposed by the Security Council to prevent aggravation of a situation. It was a guiding principle of Article 40 of the Charter and the Armistice Agreements that "the provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned." The application of this principle was that neither party should gain a military or political advantage. Yet, as the commentator remarks: "Nothing that the United Nations could do could overcome the teaching of Heraclitus that everything is in a state of flux." And inevitably the relations of the parties have been changed during the term of the Armistice Agreements. Last year indeed the Security Council was occupied for some months with a dispute between Israel and Syria over a question of drainage works, which the Israel Government was carrying out in a demilitarised frontier area, the Hulch Marshes in Northern Galilee. Syria objected that the change of the character of the marshes would affect the military position; while Israel claimed that they were performing works of a civilian nature for the purpose of reclaiming land for cultivation. The work affected land under Israel's control, and Syria was not entitled to object. In the end, that dispute, like many others, was settled by the adjudication of the Chief-of-Staff of the United Nations.

It is again a remarkable feature of these Armistice Agreements that each of them provides for the appointment of a Mixed Armistice Commission, composed of an equal number of representatives appointed by each party and a chairman, who is either the United Nations Chief-of-Staff or a senior officer from among the United Nations observers designated by him. Decisions of these commissions are based on the principle of unanimity, but at the same time may be made by a majority vote of the members present and voting. As Mr. Rosenne remarks: "This was a polite way of saying that in disputed matters the decision would in fact rest with the United Nations' chairman." The Commissions, in fact, are constantly called upon to deal with disputes; and one or two of them, like the Security Council itself, are in almost continuous session. They may be compared indeed with the Security Council in miniature. And their efficiency has been due to two factors. First, the States have been sincere in using them as machinery to overcome their difficulties; and secondly, the Security Council of the United Nations has interfered as little as possible, and done nothing to undermine their authority.

Moreover, the Mixed Armistice Commissions have been for these three years a meeting place for Jews and Arabs at which day-to-day matters can be discussed under the United Nations auspices. The Chief-of-Staff,

reporting in 1950 to the Secretary-General of the United Nations, said: "The Mixed Armistice Commission have been able to settle and to alleviate innumerable human problems arising between the parties on a local level, and generally to contribute to growing human understanding between peoples who, but a year ago, were involved in a bitter and sanguinary conflict." In this respect the Commissions are contrasted with the Palestine Conciliation Commission, also appointed by the United Nations with a view to bring about peace between Israel and the Arab States. The Israel and Arab delegations to the Commission have never been in direct contact, but have carried on their intercourse through the post-office, as it were, of the Commission, and with poor results.

In his concluding chapter Mr. Rosenne argues that, taken in the context of the Charter of the United Nations, the Armistice Agreements had the consequence of removing any belligerent rights between the parties, whose relations thereafter were to be governed by the agreements and the provisions of the United Nations Charter. That was the point of discussion before the Security Council in the summer of 1951, concerning the Egyptian maintenance of the blockade of the Suez Canal, and the general blockade practices by the Egyptians against any shipping or goods with an Israel destination The Egyptian claim that the Armistice Agreements did not put an end to the state of war, and therefore they were entitled to maintain their belligerent rights, was rejected by the Council. Moreover, all the agreements contain a non-aggression clause, which reinforces the obligation of non-aggression under the Charter.

Finally, Mr. Rosenne urges that the achievement of the Security Council in helping to bring about the Armistice Agreements places on it an obligation to continue to use its influence to secure permanent peace between Israel and the Arab States. The pamphlet ends with a warm tribute to Dr. Bunche, Mediator of the United Nations and the successor of Count Bernadotte, who single-handed, as the representative of the United Nations, brought the contending States to agreement. His outstanding success in the Armistice negotiations gives a measure of the regret that he was not maintained in the role of peace-maker. Perhaps it is not too late for the authorities of the United Nations to turn to him again for a fresh effort to bring Israel and the Arab States together round the table once more, and to transform the Armistice Agreements, in accordance with the original intention, into peace settlements.

Norman Bentwich.

Russia and the United States. By Pitrim A. Sorokin. Second Edition. Published under the Auspices of the London Institute of World Affairs. [London : Stevens. 1950. 209 pp. (index). 12s. 6d.]

First published in 1944 in the United States, this book still bears the marks of the period in which it was written, when the Soviet Union and the United States were Allies in a common struggle, and when it was assumed that the Bolshevist ideology was being slowly modified and losing its sharpness. Professor Sorokin's theme is the "essential sociocultural similarity and congeniality" between the two countries to which he attributes their "unique record of peace and co-operation." He proceeds to illustrate this similarity by a comparative analysis of American and Russian society and institutions. However, one feels that in attempting to prove too much, the author ends only by demonstrating that Russians and Americans possess common human qualities.

In the approach to the comparative study of nations, there are perhaps two dangers; either to stress the human individual qualities which are possessed in common by most peoples and therefore to assume that their

political outlook and behaviour is similar, or treat peoples as possessing fixed, and unchanging characters. Professor Sorokin seems to fall into the first category in asserting that there are no fundamental differences between the two peoples, but rather significant similarities. He buttresses his thesis by selective analysis of Russian history and very questionable analogies between Russian and American institutions. In the field of institutions he exaggerates the influence and power of the Boyarskaia Duma and the Zemsky Sobor. Both continued to exist during the Muscovite period but they can hardly be said to have exerted any effective check on the absolute authority of the Tsar. Some of his statements in this context are so vague as to lose any meaning. Thus he says that "the Muscovy Tsarist régime was as democratic as virtually any contemporary European monarchial régime" (p. 62). Nor can one agree with his assertion that from 1906 onwards "Russia became legally as well as in fact, a constitutional monarchy—more truly constitutional than for instance Germany or Austria" (p. 62). In 1906 Nicholas II declared that the supreme autocratic power still belonged to the All Russian Emperor. During this period there was no effective ministerial responsibility, and there was no constitutional or actual compulsion on the Tsar to appoint a government responsible even to the unrepresentative Duma of 1912. If any analogy can be made, the Russian constitution of 1906–1919 is comparable to the Prussian constitution of 1851 which could hardly be defined as a constitutional monarchy. When he claims that with "a slight exaggeration one may say that the banishment and imprisonment of political offenders (under the imperial régime) was more in the nature of granting them a vacation with most of the expenses paid" (p. 100), his description verges on the ridiculous. Similarly, some of his remarks regarding the Soviet Union are open to considerable criticism. For example, it is surely an overstatement, to say the least, to write that "at the time of Hitler's invasion, Russia had returned to her normal standards of morality and decency of respect for human and divine laws and values," and that "the post-war restrictions on freedom are solely the result of the cold war" (p. 90).

His analysis of the responsibility for the "cold war" is somewhat one-sided. "Causally and objectively," he writes, "the initiators of the Truman doctrine, of a coercive universal containment of Communism, of a gigantic rearmament, of the Atlantic Pact, of a new 'cordon sanitaire' (p. 181), backed up with atom bombs that have caused the revival of totalitarianism in the East." The establishment of a Communist-dominated régime in Poland, and the intervention in Rumania preceded the policies he refers to. The Communist coup in Czechoslovakia occurred before the Atlantic Pact, so did the conflict with Yugoslavia. It was the Western Powers who substantially demobilised their armies and drastically reduced their military strength, while the Soviet army has been maintained at a high level. As for the "cordon sanitaire" it is the Soviet Union which prevents the free exchange of people and ideas between Western and Eastern Europe, and has refused to join most of the international co-operative agencies of the United Nations and has recently resigned from the few which it had joined.

As to the "unique record" of peace and co-operation between Russia and the United States, one can only remark that up to 1917 the United States had only fought two wars with major Powers. The absence of war was due to the position of the United States on the periphery of world politics rather than to the essential similarity and congeniality of the two peoples.

These exaggerations are unfortunate since they detract from the value of many of Professor Sorokin's observations. His suggestion that one of the main reasons for the tension between the U.S.A. and the Soviet Union is that they have emerged from the Second World War as the two greatest Powers, and that even if the Russian régime had been different tension would still have existed, is a welcome corrective to the concentration on the ideological issue.

Ieuan G. John.

Handbook on Trade Marks Laws Throughout the World. By P. O. Hereward b.a., Barrister-at-Law. [London : Sweet & Maxwell. 1951. 210 pp. 30s.]

Since 1946, when Haddan's *Compendium on Trade Marks* was no longer kept up to date, British practitioners concerned with foreign trade mark law had to resort to the American work on *Trade Marks Laws of the World* by White and Ravenscroft. Mr. Hereward now gives us a most useful new British book on the subject. Country by country it contains all information needed by trade mark agents, lawyers and industrialists who want to file, renew or protect a trade mark abroad. Mr. Hereward has collected for all civilised countries of the world the provisions of their trade mark law and practice dealing with the Documents required for an Application for a Trade Mark, Powers of Attorney, Office Procedure, Opposition (if any), International Conventions, Maintenance and Renewals. For some countries, though not for others, he gives the Classification of Goods and the Provisions for Infringement Proceedings. Last, but not least, he deals with the question of Assignment and Licensing of Trade Marks. None of the existing older handbooks on foreign trade marks broached the question of licences under trade marks which has become of great practical importance to British exporters of branded goods of world-wide repute. Mr. Hereward evidently has been in touch with trade marks experts in many countries in order to obtain first hand authentic information on the problem of licences under trade marks, which will prove most helpful to British and foreign readers of his book. British law provides quite clearly that the grant of a licence invalidates a trade mark unless it is granted to a "Registered User" entered on the Register in accordance with the provisions of the Trade Marks Act, 1938. Under the U.S. Trade Mark Law of 1946 use of an American trade mark by a "related company" is permissible without the cumbersome formalities of the British law. In other countries, for example, France, licences under trade marks are permissible without restriction.

Mr. Hereward states that the rights of Western Germany under the International Convention are suspended at the moment; according to a notice in the *Official Journal* (*Patents*) of April 26, 1951, the Convention did, however, apply again between the United Kingdom and Western Germany. Apart from this and a few printing errors in the text of Austrian and German powers of attorney, the only criticism to be levelled against Mr. Hereward's book is the failure to produce it in loose-leaf form. Within a short period the law and practice of trade marks will obviously change in many of the 130 countries covered by Mr. Hereward's work, and the bound volume is therefore in danger of becoming obsolete all too quickly.

P. Meinhardt.

Die Rechtslehre vom Vertrauen. Privatrechtliche Untersuchungen über den Schutz des Vertrauens. By Dr. Hermann Eichler, Professor of Law at the Academy for Economic and Social Sciences, Nuremberg. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1950. xv and 123 pp.]

Many rules of the law of contract are designed to protect a party which relies on a promise made by the other party or on a custom and habit which raises the expectation that the other party would do or refrain from doing certain acts. This is a very old truth. Grotius knew it already when he referred to the "duty of keeping faith" as one of the three chief duties owed by one man to another and explained that it is one of the moral

duties which the law of obligations is designed to protect. It is, however, equally true that lawyers have not rarely been charged with overlooking this aspect of the theory of contract. Bentham has claimed that the word "expectation" is scarcely found in the vocabulary of the legal profession. Yet he had to admit that the lawyers "have followed it, without doubt, in many respects," though he blamed them for having done so "by instinct rather than by reason." He concludes that "if they had known its extreme importance they would not have failed to name it and to mark it, instead of leaving it unnoticed in the crowd." Dr. Eichler in the present book raises a similar charge against German lawyers, but—differing in this respect from Bentham—he tries to remedy the defect himself instead of clamouring that others should remedy it. Some of his considerations are no doubt worthy of approval: that the rule of good faith requires some better elaboration than the German courts and German doctrine have given it in the past is true, and that the notion of reliance may be an instrument to be employed in this task can be readily admitted. But his painstaking examination of a host of individual institutions and rules of German law has shown that a great deal has been done in the past by legislators and courts for the protection of reliance, and that by no means all of it was done "by instinct rather than by reason." Had the author extended the field of his research into legal history and comparative law (and in particular the common law system), he would perhaps have been inclined to doubt whether there was really a great deal of need for a fresh "doctrine of reliance." The present reviewer at least ventures to think that—apart from the light shed on the principle of good faith—there is little new ground broken in this study.

E. J. Cohn.

The Elements of Income Tax Law. By C. N. Beattie, ll.b., Barrister-at-Law. [London: Stevens & Sons, Ltd. 1951. xxv and 180 and (index) 10 pp.]

This work, written primarily for the law student, meets a long felt need since most elementary books on income tax are written from the accountancy or practical angle. Mr. Beattie has deliberately eschewed the mathematics of income tax and has concentrated upon the law and principles behind the figures. He has particularly borne in mind the problems which the budding lawyer, not accountant, will have to meet in actual practice. As a result the space devoted to the liability of businesses, which occupies a major part of most textbooks, is severely restricted by comparison with other topics such as income from property, liability of husband and wife, the winding up of estates, trusts and settlements, residence and the like.

The work opens with short introduction explanatory of the Income Tax Acts and their administration followed by an excellent exposition of the general scheme of the tax—"deduction (or collection) of tax at the source." Then follow chapters upon Personal Reliefs, Income from Land, Profits of a Trade, Employments and a particularly valuable chapter (7) "Income arising under Wills, Intestacies and Settlements." A miscellany of matters —interest, annuities, casual profits, patents and copyrights—are then dealt with, followed by chapters on Companies, etc., Surtax, the "Foreign Element" and Appeals, etc. For the size of the work the index is excellent and the Table of Cases adequate; it is bound to be a matter of individual preference in a book of this size which of the 2,000 odd tax cases are included or excluded.

Criticism of detail is rather out of place in a review of so short a book and a few minor and unimportant errors will doubtless be corrected in the second edition which can be looked for in the near future. It does, however,

seem to your reviewer that Chapter 8, which deals with the general law relating to interest, annuities, etc., should have preceded Chapter 7, "Income arising under Wills, etc.," especially as "Tax-Free Annuities" are dealt with at some length in this chapter.

The book can be thoroughly recommended to the law student and a knowledge of its contents should make the scoring of good marks in the Income Tax part of the Law Society's Final Examination easy. From July 1952 this work is the prescribed book for this examination, a fact which itself bespeaks the value of Mr. Beattie's labours.

A. Farnsworth.

Rent Restrictions. By Esther Dangerfield, Barrister-at-Law. "This is the Law" Series. [London: Stevens & Sons, Ltd. 1951. 130 pp. 8s. 6d.]

Of all the subjects so far included in this series, the present is perhaps the most difficult. To reduce the law of rent restrictions to simple language and some 130 pages without allowing the exposition to become obscure or dangerously oversimplified is a task which few would gladly undertake. The present book, which has a preface by Mr. R. E. Megarry and owes something to his work, demonstrates that the task is not impossible. The treatment is as full as could reasonably be expected and the text is clear and leads no-one into a false sense of security. For the primary class of users, ordinary landlords and tenants, it is an excellent guide, not only as to rights but also to dangers, and it wisely expressly warns that those intent on litigation should seek expert advice. One other class of user will certainly welcome it, the student for whom the Rent Restriction Acts and their satellites form a dreadful spectre. As an introduction to the subject this book can do much to calm their fears and make the task of digesting practitioners' works considerably lighter.

J. D. B. Mitchell.

The Nationalised Industries. Revised Second Edition. By D. N. Chester, c.b.e., Fellow of Nuffield College, Oxford. [London: George Allen & Unwin, Ltd. 1951. 93 pp. 7s. 6d.]

The contents of this useful little book, published for the Institute of Public Administration, are best described in the words of its sub-title "An Analysis of the Statutory Provisions." After a brief introduction, tracing the genesis of the various measures of nationalisation and the general tendencies which they display, it analyses the statutory provisions relating to the public corporations, both pre- and post-war, under six heads:—Constitution, Area Boards and Executives, Advisory and Consumers Councils, Ministerial Control, Finance, Accounts and Audit, Annual Reports, and Labour Relations. The treatment relates mainly to what are generally designated the Commercial Corporations (but including the B.B.C.) as opposed to the social service corporations (such as the Central Land Board, and the Regional Hospital Boards). The book ends with a Select Bibliography, which, however, is mainly limited to separate publications as opposed to articles in periodicals other than those in the journal, *Public Administration*: for example, it does not mention Prof. Friedmann's article in Vol. 10 of this Review.

The book should prove most valuable to anyone who wants to compare the provisions applying to the various corporations without wading through the voluminous Statutes, and the arrangement should enable him to find

what he wants with comparative ease—although the absence of an index will be regretted. It would have been still more useful, at any rate to the lawyer, had the numbers of the appropriate sections been quoted.

L. C. B. G.

Books and Publications received:—

The Criminal Appeal Reports. Edited by T. R. Fitzwalter Butler. Index to Volumes 1–34. Compiled by A. G. P. Pullan. [London: Sweet & Maxwell, Ltd. 1952. 1 and 33 pp. 25s. net.]

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